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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1873

The New York Times Co., et al., Petitioner

v.

United States of America, Respondent

United States of America, Petitioner,

v.

The Washington Post Company, et al, Respondent

BRIEF OF TWENTY-SEVEN MEMBERS OF CONGRESS as AMICI CURIAE

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This brief is filed on behalf of the following Members of Congress: Phillip Burton, John Dow, Bob Eckhardt, Don Edwards, Michael Harrington, Robert Kastenmeier, Edward Koch, Abner Mikva, Benjamin Rosenthal, William F. Ryan, James Abourezk, Bella S. Abzug, William R. Anderson, Herman Badillo, Jonathan B. Bingham, William Clay, Ronald V. Dellums, Sam Gibbons, Ella T. Grasso, Seymour Halpern, Peter Kyros, Parren Mitchell, Bertram L. Podell, Charles B. Rangel, Donald W. Riegle, Jr., James

H. Scheuer, and Lester L. Wolff.

Interest of Amici

The Members of Congress, on whose behalf this brief[1] is filed, have a vital interest in the outcome of these cases, distinct from that of the plaintiff, the defendants, or the general public. As members of the national legislature they must have information of the kind involved in these suits in order to carry out their law-making and other functions in the legislative branch of the government. They seek to vindicate here a legislative right to know.

In addition as elected representatives of the people in their districts, Members of Congress have a particular and profound interest in having their constituents obtain all the information necessary to perform their functions as voters and citizens. More than any other officials of government, Members of Congress have relations with the public that gives them a crucial concern with the public's right to know.

We agree with the position of the defendants New York Times and Washington Post that the courts have no inherent authority, absent a statute, to prevent publication of the documents involved here, and that no such statutory authority exists. We confine our argument, however, to the broader constitutional issues and urge upon the Court

three fundamental propositions: (1) that information which comes to light other than by strictly lawful process is nevertheless entitled to the full protection of the First Amendment; (2) that the attempt by the Government to suppress publication of these documents violates both the legislative and the public right to know; and (3) that the doctrine of prior restraint forbids advance censorship of material published by the press.

I. INFORMATION WHICH COMES TO LIGHT OTHER THAN BY STRICTLY LEGAL PROCESS IS NEVERTHELESS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT

The general approach which ought to govern solution of the problem now before the Court has been well expressed by James Madison in his Report on the Virginia Resolutions:

> "In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands....Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits."*/

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*/ Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.

The Government's approach has been quite different. The Government conceives of the problem as if the only issue were one of stolen goods. It bases its claim upon a proprietary interest in the information involved, urges that it is entitled to recover its stolen property, and contends that neither Members of Congress nor the general public can have any right to the purloined information.*/

The Government's position might be valid if all that was involved were a stolen automobile. It might even be sound as applied to the physical documents themselves, or to a copyrighted manuscript of a private author. But this approach has no valid application to information about public events. Such information, whether or not it comes to light within "the strict limits of the common law," is part of the common fund of knowledge available to the general public in its role as ultimate decision-maker. This information, therefore, comes within the ambit of the First Amendment and the issue moves to a higher, constitutional level.

It is well known to observers of public affairs that vast amounts of information become available to Congress and

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*/ After commencement of the proceedings the President, as a matter of grace, made the materials available to members of Congress. N.Y. Times, June 24, 1971.

the public in a manner which does not conform to the Executive's national security classification scheme. The affidavits of Max Frankel, Benjamin Bradlee, and other newsmen on file in the present proceedings make this entirely clear. Indeed, one of the principle functions of a free press in this country is to ferret out information which the Executive wishes to conceal. Executive officials themselves consistently disclose classified information, or engineer leaks, for the purpose of influencing public decision-making. Much other classified material emerges in memoirs, government documents taken when the official leaves office, and similar sources. The existence of such a communications system in fact marks the difference between a free press and a controlled press, between a democratic system of free expression and a totalitarian system of controlled expression.

The Executive regulations on classification can govern the internal operation of the Executive agencies. They cannot, under the First Amendment, control communication of information outside the government. To put it colloquially, a cat in the bag cannot be treated the same way as a cat outside the bag. Once the information gets outside the Executive --once the Executive loses its control for any reason--

the information becomes part of the public domain.*/

The results that flow from this state of affairs are twofold. First, once having lost control of the information the Government can, as a practical matter, rarely get the information back. The events of the past few weeks fully demonstrate the truth of this proposition. Second, whatever the rights of the Executive may be with respect to the person who first obtained the information in breach of the classification rules, the Executive should not be allowed to try to regain control of the information through muzzling the press. Such an effort, involving suppression of information at whatever point it crops up in the communications system, under the guise of fact or opinion or even art or literature, could only be accomplished by the kind of controls that are characteristic of a police state.

II. THE ATTEMPT BY THE EXECUTIVE TO SUPPRESS PUBLICATION OF THESE DOCUMENTS VIOLATES BOTH THE LEGISLATIVE AND THE PUBLIC RIGHT TO KNOW

The defendants in these proceedings have, quite naturally, stressed the protection which the First Amendment extends to the speaker, the writer and the publisher of information. This case also presents, in a way no other case in our history has before, the other side of the First

*/ We are not discussing here the right of Congress, one of its members, or the general public to force the Executive to disclose information under powers inherent in the legislature, the First Amendment, or statutes such as the Freedom of Information Act.

Amendment coin,--the right to listen, to hear, and to obtain information. Two aspects of this right to know are involved here. We discuss first the right of Members of Congress and second the right of the general public.

A. The Legislative Right to Know

The legislative right to know derives from the position and function of the legislative branch in the general structure of our government. It has been recognized many times in the decisions of this Court. See, e.g., Watkins v. United States, 354 U.S. 178 (1957). The legislative right to know also derives from the First Amendment. That constitutional mandate was designed to maintain an effective system of freedom of expression and members of the legislature are entitled, as are private citizens, to share its benefits and protections.

It would be hard to overestimate the importance to our form of government of the legislative right to know. That right is indispensable to the performance of every function of the legislative branch. Clearly legislative access to information ought to be at least on a par with that of the Executive. For the legislative function is not only to initiate the basic policies which the Executive branch must follow, but to review the administration of those policies by the Executive and revise them in the light of that knowledge.

The legislative right to know is of particular importance at this period of development in our national affairs. The constant growth of the executive power has been a major characteristic of our age. More and more the people of our country have been concerned that the expansion of executive power has upset the original balance contemplated by the framers of our Constitution, that monopoly of power in the Executive has resulted in the government losing touch with the needs and desires of its own citizens, and that enhanced power in our elected representatives is imperative to restore a healthy division of authority in government.

There are a number of reasons for this unparalleled and dangerous growth of Executive power in the United States. There can be no doubt, however, that one of the principal reasons is the far greater access of the Executive to information, and its unwillingness to share that knowledge with Congress and the public. In today's world, control of the information process is the key to power.

It is crucial to note, also, that the legislature cannot adequately perform its function upon the basis of "official" information submitted to it by the Executive branch. Every observer of government knows that "official" information, in most situations, tells only half the story.

Any bureaucracy, by the nature of the institution, tends to reveal only what it believes will support its own position and advance its own policies. A realistic fund of information must depend upon materials which lie far below the surface. The system of checks and balances cannot rest upon such bland sources of information as Executive hand-outs.

In this process of obtaining fuller, richer and more realistic information the press plays a vital role. It is not too much to say that this is perhaps the most important function of a free press. Obviously it is not a function that can be performed by a press under governmental constraint.

There is no need to stress here that the documents involved in these proceedings could not be more relevant to the issues now pending in Congress. Termination of the war in Vietnam, extension of Selective Service, appropriations for the conduct of the war, and numerous other questions are before the House and the Senate at this very moment. In addition, broader problems going to the respective powers of Congress and the President in connection with the making of war and the conduct of foreign relations are pressing for attention. It thwarts common sense that the information here in question should be withheld from Members of Congress.

In sum, to close off access to the kind of material the Government is now attempting to suppress would cripple the legislature in the performance of its constitutional functions. It would go far to relegate the legislative branch to second rate status in relation to the Executive, to jeopardize the balance of power between the branches of governments and to alter the whole constitutional structure.

B. The Public Right to Know

The public right to know has been repeatedly recognized by this Court as a vital aspect of our system of freedom of expression. As Mr. Justice Brennan said in his concurring opinion in Lamont v. Postmaster General:

> "It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful....I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (1965).

The public right to know was the basis of the decision upholding the fairness doctrine in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), and the

right to read what one pleases in Stanley v. Georgia, 394 U.S. 557 (1969). Lower Federal courts have likewise applied the principle to uphold the interests of the public as recipients of information in an untrammeled system of freedom of expression. See, e.g., Office of Communications of United Church of Christ v. F.C.C., 359 F. 2d 994 (D.C. Cir. 1966); Mandel v. Mitchell, 39 L.W. 2530 (1971).

Members of Congress, of course, have the same interests as other citizens in protection of the right to know. They also have a particular interest as members of the legislative branch. Effective performance of their duties as elected representatives depends upon a knowledgeable constituency. Members of Congress and the people they represent must operate on a shared basis of understanding, upon a common wavelength. It is vital to the functioning of a democratic system that the electors have enough information to grasp the issues upon which their representatives are voting. It is likewise essential to the Member of Congress that he relate to the ideas and responses of his constituents. This reciprocal relation depends upon the fullest access possible to a common store of information. The public right to know, therefore, takes on a special importance when it concerns matters pending before the legislature.

Once again, it is difficult to imagine any information more relevant to the public right to know than the documents which the Government is here trying to keep the public from seeing.

The precise degree of protection afforded by the doctrine of the right to know, as embodied in the First Amendment, has not yet been fully developed. It may be some years before the specific rules can be worked out. Yet the starting point is clear. It is that members of the public have, as a general proposition, the right to know all information upon which decisions that affect their lives and property are based. This is the fundamental premise of a democratic system. Exceptions to the general rule must be narrow and specific. They would be recognized only in such special areas as military weapons and operations, current negotiations with a foreign country, or damage to individual reputation by premature disclosure of investigative data.

Wherever the line of exceptions may be drawn it has not been reached in these cases. Judge Gurfein and Judge Gesell have both found, after a full hearing, that no substantial breach of national security is involved. The withholding of the information here in question has a maximum impact upon the constitutional right to know and the function it is designed to perform. There is no sound ground

for not giving full effect to the constitutional principle in these cases.

A genuine and whole hearted insistence upon maintaining the right to know is vital to the welfare of the nation and its ability to cope with the many problems that now confront it. Much of the frustration, mistrust and misunderstanding that prevails in many quarters of the land today is due to our failure to keep the decision-making process on a more open and observable basis. Vigorous enforcement of the constitutional right to know would go far to restore confidence in our institutions and evoke support from the people who are most affected by their operation.

III. THE DOCTRINE OF PRIOR RESTRAINT FORBIDS ADVANCE CENSORSHIP OF THE MATERIAL HERE INVOLVED

The doctrine of prior restraint, growing out of revulsion to the English censorship laws, holds that governmental restrictions cannot be imposed upon expression in advance of publication. Even though the expression may be subject to subsequent punishment or can otherwise be restricted at a later point, it cannot be proscribed prior to publication. The doctrine was made part of our constitutional law in Near v. Minnesota, 283 U.S. 697 (1931). It has since been repeatedly confirmed. See e.g., Lovell v. Griffin, 303 U.S. 444 (1938); Kunz v. N.Y., 340 U.S. 290 (1951); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968).

The theory of the prior restraint doctrine is that a system which requires a publisher to submit his material in advance to a government censor is so repressive by its very nature as to be inevitably destructive of free expression. The reasons for this have been stated as follows:

> "A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows."*

So oppressive is a scheme of prior restraint that it is not an exaggeration to say that it smacks of totalitarian rather

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* T.I. Emerson, The System of Freedom of Expression (1970), p. 506.

than democratic methods of control.

All the parties to these cases, and all the courts that have passed on the various aspects of them, recognize the critical importance of the doctrine of prior restraint. The issue here has turned, not on the validity of the doctrine, but upon whether an exception should be made to it in the case of national security. In a dictum in Near v. Minnesota the Court stated that there might be exceptional cases where the doctrine would not be applied, mentioning "actual obstruction to /the/ recruiting service or the publication of the sailing dates of transports or the number and location of troops;" "obscene publications;" and "incitements to acts of violence and the overthrow by force of orderly government." 283 U.S. at 716 . An actual exception has been made in the case of motion picture censorship boards to the extent of upholding laws which require abvance screening of films against possible illegal obscenity. Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Freedman v. Maryland, 380 U.S. 51 (1965). No other exceptions have been permitted. It has never been suggested by any court that the press could be subject to any form of advance censorship.

In the cases at bar, for the first time in the history of this country, various formulations have been proposed for an exception applying broadly to national security matters. The Government, if we understand its position correctly, urges that an exception be made for any substantial breach of national security, and that the publication of any classified document would per se constitute such a breach. Judge Gurfein would allow an exception

for "information or ducuments absolutely vital to current national security." The Court of Appeals for the Second Circuit approved censorship of items which "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

We submit that any of the above formulations would effectively nullify the prior restraint doctrine in the area of national security matters and would gravely jeopardize the whole system of freedom of expression. The Government's proposal would permit an injunction against the publication of any classified material unless the publisher could show that the classification was arbitrary and capricious. If this Court sanctions such a rule the press will be at the mercy of the Department of Justice. The Government will be in a position to leak any classified information that serves its own purposes and shut off countervailing information. The Executive would be arrogating to itself dictatorial power over the dissemination of large quantities of information bearing upon national defense, foreign policy, and most of the other important issues of the day.

The formulations of Judge Gurfein and the Court of Appeals for the Second Circuit, although more stringent on their face, would be almost equally destructive of a free press in America. We do not make this statement lightly. We ask the Court to consider carefully how the doctrines put forward in these courts below would operate in practice. Under any of these formulations the Executive can hold up publication simply by alleging that a serious breach of national security would occur. The Court would then issue a

restraining order, allow the Government to present its case, and then decide whether there was sufficient danger to warrant issuance of an injunction against publication. This process in itself is a system of prior restraint. It involves an examination of the material by Executive officials, an order to withhold publication, and a governmental decision as to whether the material could be published or not. The exception has swallowed up the rule.

Moreover, most of the proceeding - certainly the critical parts - would take place in camera. Both the New York Times and the Washington Post cases followed this procedure, on the ground that otherwise the injury to national security would occur in the course of hearing the case. Only the defendants and their counsel were permitted to attend the in camera session. More than that, no one was allowed to be present unless he was first given security clearance by the Government. Hence the plaintiff in the case was able to dictate what individual defendants, and what counsel, were entitled to participate in determination of the issue. Such a procedure can hardly be recommended in a democratic society.

In any event, we submit that any rule for allowing exceptions which would create a system of prior restraint in the very process of applying the rule cannot be reconciled with the First Amendment. We do not say that under no circumstances can an exception to the prior restraint doctrine be justified. But it seems clear that a rule based, as are the rules suggested above, upon the gravity of the breach of security can only operate to install a full, not exceptional, system of prior restraint in the whole "national security" area.

The task of formulating a workable rule for exceptions is a complex one. Any such rule would probably have to be couched in terms of allowing the exception only for certain very specific kinds of information. As the Court suggested in Near, information on troop movements in times of war might fall within the excepted category. Perhaps details concerning the design of military weapons would be another category. Beyond the immediate area of military operations there should be few, if any, classes of information subject to advance restraint. Very little consideration has been given to the problem and no one is in a position to give a satisfactory answer at this time.

Even Judge Gesell's formulation in his opinion refusing a preliminary injunction would raise troubling questions unless considered in the context of his rulings taken as a whole. Judge Gesell, after considering these matters in the preliminary injunction stages, gave a stricter formulation than did Judge Gurfein, requiring a "showing of an immediate, grave threat to the national security...in close and narrowly defined circumstances." Applying this test Judge Gesell correctly refused to apply any restraint.

The Government's complaint contained no allegation of any concrete facts which would suggest a breach of national security in any specific area that might conceivably be subject to an exception to the prior restraint rule. Under such circumstances no temporary restraining order should have been issued and the complaint should have been dismissed. Therefore, the decision of the Court of Appeals for the District of Columbia

should be further elucidated. "Closely and narrowly defined circumstances" must be shown to be as narrow as those exceptional circumstances alluded to in Near v. Minnesota.

We urge the Court to follow this course. Especially we urge the Court not to accept any formulation of exceptions to the prior restraint rule which will undermine the force and vitality of that traditional doctrine.

CONCLUSION

The issues involved in these cases go to the heart of the decision-making process in this country. The tendency of government in recent years has been toward ever more secrecy in its operations, and toward a consequent monopoly of power in the hands of a few high Executive officials. We suggest that this direction of events is fraught with danger. Secrecy in government is fundamentally anti-democratic. It perpetuates bureaucratic errors and leads ultimately to disaster. It is time our constitutional doctrines were called into play in opposition to those forces and invoked to promote conditions under which an open, representative and balanced government will be assured.

We respectfully submit that the complaints in these proceedings should be dismissed.

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APPENDIX

Matters Pending Before Congress the Consideration of Which Would be Affected by the Materials Involved in these Proceedings

While the Justice Department was preparing its case to restrain publication of this highly pertinent material, and while the legal action in the District Court for the Southern District of New York was going on, Congressmen were giving official recognition to the pertinence of the articles by inserting them in the Record.[1/]

During the very period during which the temporary restraining order was in effect and was blocking further installments, both the House and Senate were dealing with Legislative topics whose subject matter made the content of the Task Force Study germane

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1/ Congressmen McCloskey and Harrington inserted the New York Times installments of Sunday, June 13, and Monday, June 14, in the Congressional Record on June 14, 1971 (H-5096 - 5136; E-5794 - 5832). On the same day Senator McGovern inserted the same documentation (S-8977 - 9015). On the next day Senator McGovern inserted the third installment which appeared in the Tuesday, June 15, New York Times in the Congressional Record (S-9111 - 9130), and Congressmen McCloskey and Harrington inserted the same article in the Record (H-5202 - 5222; E-5878 - 5896).

to the Congressional debate. On June 16, 1971, two votes were taken in the Senate and 4 in the House on topics to which the study is germane.

In the Senate these included the vote on the Chiles Amendment, which barred use of funds supplied under H. R. 6531 (an amendment to the Selective Service Act which provided pay increases for military personnel) to support U. S. forces in Indochina after June 1, 1972, under certain conditions.[1/] The vote on this amendment was: Nay, 52; Yea, 44. Thus, a change of 5 votes would have switched the result. Also, the Senate considered the McGovern-Hatfield Amendment, also to H. R. 6531, to amend the Selective Service Act. This provided for the shorter cut-off date to December 31, 1971. The vote on this amendment was: Nay, 55; Yea, 42. A seven vote change would have been required to change the result.

It is impossible to say that, had The New York Times installment, due to be printed on June 16, been printed that day, it would have changed 5, or 7 Senators' minds; but it is also impossible to say that it would not have. It is certain, however, that the articles were of the type that afford the kind of persuasion or conditioning that affects votes on issues like these before the Senate.

1/ Congressional Record, June 16, 1971, S-9275.

The House was on the same day acting on the Military Procurement Authorization Bill (H. R. 8687). The House continued consideration on June 17, 1971, taking up the Nedzi-Whalen Amendment (providing a deadline after which funds under the procurement act should not be used for Indochina war support); the Harrington Amendment (to delete a title of H. R. 8687 providing an authorization for Vietnamese forces and their allies, and local forces in Laos and Thailand); and considering several other amendments variously establishing cutoff dates and restrictions respecting funds which might find their way into support of the Indochina war.

Debate on these amendments was wide-ranging. For instance, Congressman John F. Flynt, Jr., of Georgia, reviewed what he called the mistaken premise upon which the Tonkin Gulf Resolution was enacted, the misinformation that was afforded the public and the Congress in that connection, the circumstances of its repeal, and the fact that the present war is being waged without a congressional declaration of war.[1/] Congressman Sidney R. Yates of Illinois noted in debate that it is now clear that the facts surrounding the Gulf of Tonkin episode were kept from Congress at the time it voted on that resolution. He noted that we are

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1/ Congressional Record, June 17, 1971, H-5363.

reading in the press today the results of giving more and more power to the President and deferring to his judgment in the early 1960's.[1]

Congresswoman Margaret M. Heckler, of Massachusetts, citing the revelations in The New York Times of the deceptions practiced on the Congress early in the Vietnam buildup, said it was clear that Congress must now express its will. She went on to mention The New York Times' revelation that the Gulf of Tonkin Resolution was drafted three months before the incidents occurred.[2]

Congressman Lionel Van Deerlin, after referring to The New York Times series of articles, said that he did not think the war would have been allowed to progress the way it has if Congress had been properly informed back in 1964 and 1965.[3] Congresswoman Bella Abzug, of New York, called for full access to the entire McNamara study, saying she believed the information is necessary to enable the Congress to make a realistic assessment of the prospects for a speecy and total termination of the American military role in Indochina.[4]

1/ Congressional Record, June 17, 1971, H-5370.

2/ Congressional Record, June 17, 1971, H-5371.

3/ Congressional Record, June 17, 1971, H-5370.

4/ Congressional Record, June 17, 1971, H-5378.

Congressman Paul McCloskey, of California,[1] Congressman Bertram Podell, of New York,[2] Congressman James Abourezk, of South Dakota,[3] and Congressman William Ryan, of New York,[4] were among Members of Congress who discussed The New York Times documents during debate on the Military Procurement Authorization Act of 1971.

The question of candor of public officials during the development and the conduct of the war was a prominent feature of the debate on the Procurement Act, and such question of candor, or lack of it, was related to the desirability of Congressional action or Congressional expression calculated to bring the war to an end.

Nor have the issues which arose in these bills become moot by the defeat of the Hatfield-McGovern Amendment and the passage of the Military Procurement Authorization Act. There are at least four classes of legislation in the House in which the issue will undoubtedly be raised again: Foreign Aid Appropriations and Authorization Bills, Military Construction Authorization Bill,

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1/ Congressional Record, June 16, 1971, H-5305.

2/ Congressional Record, June 16, 1971, H-5311.

3/ Congressional Record, June 16, 1971, H-5331.

4/ Congressional Record, June 17, 1971, H-5379.

Defense Appropriation Bill, and Vietnam Disengagement Act.

Also, there is presently a discharge petition on the Speaker's desk for the discharge of the Vietnam Disengagement Act (H. R. 4101).

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1873

NEW YORK TIMES COMPANY, *et al.*,

Petitioners,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

THE UNITED STATES OF AMERICA,

Petitioner,

—v.—

THE WASHINGTON POST, *et al.*,

Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Motion

The undersigned respectfully request leave to participate in the oral argument herein on the same terms as in the courts below. The parties have orally consented to the filing of this brief amicus curiae.

Interest of Amici Curiae

For fifty years the American Civil Liberties Union, and its New York State and Capital Area affiliates, have sought to preserve the freedoms established by the Bill of Rights. Amici have participated in thousands of cases involving the First Amendment to the Constitution. Amici believe that the instant case poses questions of critical importance to the continued existence of an informed citizenry and a free press.

Introduction

The suits filed by the United States to enjoin publication of the Vietnam Papers by The New York Times, The Washington Post, and other newspapers are unprecedented in American history. We have been able to discover no case, and counsel for the parties have referred to none, in which the federal government has asked the courts to censor the publication of a newspaper. The effort to do so in this case—so far successfully—is a singular departure from a common understanding which exists between the government and the people, now breached for the first time in two hundred years. The central ingredient of that understanding is that the people have the right to know what their government is doing, whatever the effect on the reputation of officials or administrations. So long as the information relates to the conduct of government—no matter how embarrassing, deceitful or dishonest that conduct may be—the people have a right to know about it, and the press has a duty to publish it. The government's only duty is to stand aside.

This understanding by the people of the United States has a direct historical relationship to the experience suf-

fered by the people of England in the process of securing freedom of the press, beginning particularly in the 16th Century when a decree of Star Chamber of June 23, 1585, imposed a system of licensing upon the press. The decree's preamble said:

> "Whereas sundry decrees and ordinances have upon grave advice and deliberation been heretofore made and practiced, for the repressing of such great enormities and abuses as of late (more than in times past) have been commonly used and practiced by divers contemptuous and disorderly persons, possessing the Art or Mystery of printing and selling of books: And yet notwithstanding, the said abuses and enormities are nothing abated; but (as is found by experience) do rather more and more encrease, by the willful and manifest breach and contempt of the said ordinances to the great displeasure and offence of the Queen's most Excellent Majesty . . ."

Now, our government, frightened by the "Art or Mystery of printing", once more asserts the right to lay hands upon the press and to prohibit the publication of information which, though perhaps embarrassing to the men who have occupied high office, is vitally important to the people of the United States and to the world at large.

There are two additional points of importance. First, The New York Times and The Washington Post are not the only defending parties in this case. The readers of these newspapers and the general public, though not named in the caption of the case, are as much parties in interest as the nominal defendants. Indeed, their interest is *superior* to that of the newspapers because the latter are merely instruments for informing the public of day to day events without which they would be unable intelligently

to fulfill their role as citizens interested in the welfare of the nation.

Second, the Court cannot overlook the subject matter of the documents which the government seeks to suppress. Those documents reveal how our country became involved in a war which is more controversial and divisive than any other governmental action of this century, and which cannot be matched by any event in American history with the exception of our Civil War. The country is torn over the Vietnam war. It has spawned violence, hatred and bitterness. It is on everyone's mind and everyone's lips. It has resulted in the deaths of tens upon tens of thousands of human beings—and its genesis, purposes, and effects are the subject of endless discussion.

Now, when it is learned that there are documents which might provide answers to some of those questions, which would allow the people to judge the men who generated the war, and which will give the people an opportunity to exercise their will in order to avert another such adventure—now the Government steps in to prevent the people from acquiring that information.

This Court must categorically reject the Government's assertion that revelation of the documents will endanger the national security. To accept that claim is to accept the *ipse dixit* that the affairs of government are or should be beyond the reach of ordinary citizens, and that officials are not accountable, here and now, for the actions they take in our name.

The only legitimate claim of national security that can be advanced in this case is one made on behalf of the citizens of the United States. The right of the people to know, and the right of the press to be free, are the real

interests of national security which are at stake in this case. The nation's security will be best insured by condemning the act of censorship here and by requiring that the First Amendment to the Constitution take precedence over all other claims.

In this vein, we observe that freedom of speech in this country has already suffered a severe setback in this case. With all allowance for the fact that the claim by the Government here was a novel one, the granting of a Temporary Restraining Order in the Southern District of New York, and the stays granted the Government to prevent publication there and in the District of Columbia and Massachusetts, have already resulted in censorship of material needed by the people and their legislative representatives to exercise their proper role in a democracy.

There should have been no stopping of the presses on the basis of the generalized allegations made by the Government in this litigation. Before a restraining order is granted which would prevent publication for even an hour the Government should be required to make *particularized* allegations of the relevant kind of harm to the national interest* that would ensue from publication and, in addition, make out a prima facie case to a District Judge *on the spot* that publication would in fact cause such harm. The Government has met neither of these requirements, and the course of litigation has shown that they could not have. It is therefore all the more unfortunate that the press and the people have endured two weeks of censorship of the important material involved in the Vietnam Papers.

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* The specific criteria which we think should govern are set out and discussed in Section I of this brief.

I.

The well established First Amendment prohibition against prior restraints upon the dissemination of information relevant to questions of public or general interest precludes the issuance of an injunction against the publication of the historical accounts involved in this litigation.

A. The Importance of the Ban on Prior Restraints

The constitutional prohibition on the imposition of prior restraints upon the dissemination of information of "general or public interest" is among the most important protections provided by the First Amendment. Designed as a procedural safeguard to insure that all information relevant to the exercise of an informed political judgment gains access to the market place of ideas, the ban on prior restraints stands as the mainstay of our commitment to free trade in ideas.[1]

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[1] The ban on prior restraints emerged historically from the bitter struggles over the English licensing laws. In 1537, fearful of Puritan agitation, the Star Chamber of Henry VIII promulgated comprehensive regulations licensing the printing of books. Tanner, *Tudor Constitutional Documents 1485-1603*, 279-84 (1903). In 1637, the Star Chamber directive was dramatically expanded and became the model for the act of the Restoration Parliament for the licensing of books, 14 Car. II, c. 33. After years of libertarian agitation (see, Milton, *An Appeal for Unlicensed Printing* (1644), the licensing acts were permitted to lapse in 1694. Although the press continued to chafe under the restraints of the law of seditious libel, the lapse of the licensing act and the adoption of the First Amendment signified the end of prior restraints on information of general and public interest. In fact, even under the highly repressive Sedition Act from 1798-1801, no attempt to secure injunctive relief against the Republican press was made because of the general understanding that the First Amendment absolutely forbade the imposition of a prior restraint against newspapers.

For more than sixty years this Court has re-affirmed the ban on Government pre-censorship of information "of general or public interest."[2] Mr. Justice Holmes, writing for this Court in *Patterson* v. *Colorado*, 205 U.S. 456 (1907) recognized that:

> "the main purpose of such constitutional provisions [the First Amendment] is 'to prevent all such previous restraints upon publications as had been practiced by other governments . . . " 205 U.S. at 462.

In *Near* v. *Minnesota*, 283 U.S. 697 (1931), Chief Justice Hughes, in a landmark decision, ruled that an injunction against the publication of a newspaper constituted an unlawful prior restraint. In the forty years since *Near* v. *Minnesota*, this Court has time and time again reiterated that prior restraints are anathema to the proper functioning of a democratic society. *E.g.*, *Grosjean* v. *American Press Company*, 297 U.S. 233 (1936); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Niemotko* v. *Maryland*, 340 U.S. 368 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958).[3]

The abhorrence of prior restraints rests upon the understanding that a fundamental prerequisite of a functioning

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[2] The phrase, information "of public or general interest" was originally coined by Warren and Brandeis in their classic article, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). This Court adopted the phrase to describe the scope of constitutional protection from State libel laws. *E.g.*, *Rosenbloom* v. *Metromedia, Inc.*, —— U.S. ——, 39 U.S.L.W. 4694 (June 7, 1971).

[3] This Court's continuing concern with the danger of vague and overbroad statutes in the First Amendment area reflects a recognition that such statutes are the functional equivalent of licensing systems. *E.g.*, *Coates* v. *City of Cincinnati*, —— U.S. ——, 39 U.S.L.W. 4630 (June 1, 1971).

political democracy is an informed citizenry. In the words of Judge Cooley, the prohibition on prior restraints is designed to disable the State from preventing:

> "Such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley, *Constitutional Limitations*, 886 (8th ed.). See also Chaffee, *Free Speech in the United States*, 10, 221 (5th Printing 1954).

Functionally, the prohibition upon governmental precensorship of information of "general or public interest" is designed to preserve two complementary constitutional rights—the right of the people to be informed and the right (and obligation) of the press to inform them. This Court has forged a proud constitutional heritage in protecting those rights.

In a series of opinions this Court ruled that citizens in a democracy possess an inalienable right to receive precisely the type of political information which the Executive now seeks to enjoin.[4] *E.g.*, *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).[5]

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[4] James Madison described the right to know as follows:

"Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both" (1822). (Quoted in *The Complete Madison* (1953), p. 337.)

[5] See also, *United States* v. *Dellapia*, 433 F.2d 1252, 1258 n. 25 (2nd Cir. 1970); *Caldwell* v. *United States*, 434 F.2d 1081, 1089 (9th Cir. 1970); *Hiett* v. *United States*, 415 F.2d 664, 671 (5th Cir. 1968); *Brooks* v. *Auburn University*, 412 F.2d 1171, 1172

Similarly, this Court has rendered a virtually unbroken line of decisions upholding the right of a free press to disseminate information on public issues free from governmental restraint, even when such dissemination was alleged to have impinged upon competing social interests.[6] *E.g.*, *Near* v. *Minnesota, supra; Grosjean* v. *American Press Company, supra; Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Rosenbloom* v. *Metromedia, Inc.*, —— U.S. ——, 39 USLW 4694 (June 7, 1971); *Ocala Star-Banner Company* v. *Damron*, 91 S. Ct. 628 (1971); *Monitor Patriot Company* v. *Roy*, 31 S. Ct. 621 (1970); *Time, Inc.* v. *Pape*, 91 S. Ct. 633 (1971); *Greenbelt Coop. Publ. Assn.* v. *Bresler*, 398 U.S. 6 (1970); *Beckley Newspaper Corp.* v. *Hanks*, 389 U.S. 81 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

(5th Cir. 1969); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970); *Mandell* v. *Mitchell*, —— F. Supp. ——, 39 L.W. 2531 (E.D.N.Y. 1971); *United States* v. *B & H Dist. Corp.*, 319 F. Supp. 1231 (W.D. Wisc. 1970); *ACLU* v. *Radford College*, 315 F. Supp. 893 (W.D. Va. 1970); *Williams* v. *Blount*, 314 F. Supp. 1356 (D.D.C. 1970); *Smith* v. *University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969).

[6] Thomas Jefferson described the significance of a free press to a functioning democracy as follows:

> "The way to prevent these irregular interpositions of the people is to give them full information of their affairs through the channels of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. *The Papers of Thomas Jefferson* (1955) Vol. XI, p. 49.

Thus, the prohibition on prior restraints is an integral bulwark of our nation's basic commitment to "open and robust debate" with respect to public affairs. *New York Times* v. *Sullivan*, 376 U.S. 254, 269-270 (1964), recently reaffirmed in *Rosenbloom* v. *Metromedia, Inc.*, —— U.S. ——, 39 U.S.L.W. 4694 (June 7, 1971). As this Court stated in *Thornhill* v. *Alabama*, 310 U.S. 88 (1940):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of our society to cope with the exigencies of their period." 310 U.S. at 102.

The constitutional prohibition on prior restraints is of critical importance because a prior restraint, as opposed to a system of subsequent criminal sanctions, endangers the ability of citizens to secure access to the "information needed or appropriate to cope with the exigencies of [his] period." As Professor Thomas Emerson, the nation's foremost First Amendment scholar, has noted:

> "[A system of prior restraint] is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." T. Emerson, *The System of Freedom of Expression*, 506 (1970).

The core constitutional values of an informed citizenry and a free press are specifically and egregiously threatened

by the injunction sought in this case, as the events of the past two weeks graphically illustrate. Information critical to the exercise of informed political judgment has already been withheld from the public and their representatives in Congress during the pendency of several critical votes involving the war in Vietnam. Thus, during a two week Congressional debate on the war in Vietnam, our democracy has been forced to function, in part, in the dark.

Even more destructive to First Amendment values than the simple unavailability of a particular document, or set of documents, is the system of prior restraints which we have endured for the past two weeks. We have witnessed, for the first time in our nation's history, governmental pre-censorship of a newspaper's publication of material of general and public interest through a network of restraining orders, stays and appeals—in short we have been subjected to precisely the licensing apparatus it was the purpose of the First Amendment to dismantle forever. See Note 1 *supra*. Whatever the final outcome of this case, a dangerous precedent has been established which strikes at the very core of the First Amendment.

B. Any Acceptable Constitutional Test Precludes an Injunction Here

On at least two occasions the Supreme Court has indicated that there may be *no* previous restraint of publication under the First Amendment. Justice Holmes, for the Court in *Patterson* v. *Colorado*, *supra*, stated it to be "the main purpose" of the First Amendment to prevent *all* such restraints (205 U.S. at 462), and in *Grosjean* v. *American Press Co.*, *supra*, a unanimous Court stated that "by the First Amendment it was meant to preclude the states, from adopting *any form* of previous restraint upon

printed publications . . . ." (297 U.S. at 249) (emphasis added in both cases).

It is true of course that in the *Near* case—decided, it should be noted, prior to *Grosjean*—the Court in dicta narrowly qualified the absolute prohibition on prior restraints by stating that "a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." 283 U.S. at 715.[1]

Even if it is to be accepted that the unqualified language of the *Patterson* and *Grosjean* cases has been qualified by the dictum in *Near*, the history of the First Amendment compels two important conclusions:

1. The *Near* "exception" must be construed as narrowly and specifically as possible; and

2. The Government must carry the highest possible burden of persuasion to establish that a given situation is in fact such an "exception."

1. *The Standard.* At the very minimum, in order to pass constitutional muster, a standard for prior restraint must satisfy two criteria, both of which the Government must

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[1] The founders clearly recognized that information concerning military matters was not an exception to the First Amendment. Thomas Jefferson stated: "The first misfortune of the Revolutionary War induced a motion to suppress or garble the account of it. It was rejected with indignation." *The Writings of Thomas Jefferson* (1904), Vol. XIII, p. 264.

"Your fellow citizens think they have a right to full information in a case of such great concernment to them. It is their sweat which is to earn the expenses of the war, and their blood which is to flow in expiation of the causes of it." Letter from Thomas Jefferson to Eldridge Gerry, Jan. 26, 1799. *The Writings of Thomas Jefferson* (1904), Vol. X, p. 83.

meet before achieving its goal of censorship. The first criterion defines the type of information that could conceivably be suppressed; the second criterion is whether the information is of value in permitting citizens to render an informed judgment on public issues. Even if the information satisfies the first criterion it may not be censored if it falls within the second category. In other words, the information must be shown to be within the first criterion *and* outside the second criterion.

As we maintain below, the information involved in this case is so far from that which could be properly suppressed that there is, strictly speaking, no reason for the Court to elaborate the governing standards in detail. Nevertheless, we propose minimal standards because of the importance of clarifying this issue for the future.

The only information that could conceivably be suppressed under the first criterion is limited to the following:

a. Present or future tactical military operations;

b. Blueprints or designs of advanced military equipment; and

c. Secret codes.

The common denominator of the above classes is that an informed citizen need not have access to such information to perform his role properly. In contrast, if the Government's vague and broad test "information detrimental to the national security" is accepted, there would be virtually no limit to the Government's ability to seek injunctions in District Courts. Indeed, the concept of "national security" is a political concept, which involves

in its application a matter of discretion that could be employed to stifle First Amendment rights.

So much for the first part of the standard—which limits the Government to seeking injunctions against publication of particularized categories of information.

Furthermore, even if the Government could prove particularized categories of information—for example, future plans for the landing at the Bay of Pigs or the invasion of Laos or Cambodia—that information would nevertheless be within the second category and therefore absolutely protected against prior restraint. Such information involves questions of public policy—whether to enter a new war or a wider war—that must be subject to the debate and will of the people. In such cases, there could be no injunction because the key premise of the First Amendment is that on public questions there should be "open and robust debate," *New York Times, Inc.* v. *Sullivan, supra,* 374 U.S. at 269-70.

The value of the suggested distinction is illustrated by the Bay of Pigs situation. Subsequent to the events, President Kennedy was reliably reported as having stated to the Managing Editor of the New York Times, "If you had printed more about the operation, you would have saved us from a colossal mistake." See Bernstein and Gordon, *The Press and the Bay of Pigs,* The Columbia University Forum, Fall 1967.

2. *The Application of the Standard to This Case.* If the criteria suggested above are applied to the material which the New York Times seeks to publish no prior restraint may be condoned.

First, there is significant doubt whether any of the documents involved contain information creating any danger whatever to our "national security", much less the more specific criteria we recommend as the proper standard. Although as amicus curiae the ACLU was not given access to the *in camera* hearings, the opinions of the two District Judges who have ruled on the issue, after conducting hearings at which the Government was given a chance to prove its case, are persuasive evidence that the documents here cannot be suppressed consistently with the First Amendment.

It should be borne in mind that of the 19 federal judges who have reviewed the materials a total of 12 have flatly rejected the Government's position on the "prejudicial" effect of the documents. The others believe that further *in camera* hearings are desirable. *Not a single federal judge* has so far stated his agreement with the Government's claim. Surely, this is weighty evidence as to the "sensitivity" of the documents. The point is all the more telling when it is considered that the Government initially claimed in its complaints that the materials *already* made public were sufficiently prejudicial to the national interest to have been suppressed. We still await proof of this assertion.

Second, even if several of the documents in question would, for the sake of argument, fall within the first criterion, their central importance to the proper functioning of a political democracy is plain. Accordingly, following the basic purposes of the First Amendment, the Court should not tolerate censorship of information that would be valuable to an informed citizenry on public questions. Simply put, if information is of "general or public interest", no

prior restraints on its dissemination are permissible. Cf. *Rosenbloom* v. *Metromedia, Inc., supra.* Only that narrow species of data which is not of value to the exercise of an informed political judgment by the electorate may even arguably be the subject of an injunction. Secrecy does not mean safety, as so many of the Congressmen and other public figures who have already welcomed the disclosures have reminded us.[8]

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[8] In this connection, it must be made clear that the ministerial act of government officials in labeling certain information as "Secret" or "Top Secret" can never be a substitute for judicial review under whatever First Amendment criteria are ultimately adopted. House Report No. 1895, 81st Cong., 2d Sess., reprinted in 2 U.S. Code Cong. Serv. (1950) 2297-2300, in describing §798, expressly recognized that "the classification must be *in fact* in the interests of national security" before criminal conviction will be authorized. A contrary ruling would in effect turn over the constitutional decision to administrative officials and thereby enshrine exactly the kind of licensing procedure that it was the explicit purpose of the First Amendment to eliminate. See *Near* v. *Minnesota, supra,* 283 U.S. at 713. As the Court said in *United States* v. *Reynolds,* 345 U.S. 1, 8 (1953), "a complete abandonment of judicial control would lead to intolerable abuses" and "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 8, 9-10.

In addition, the Court should not accept a claim by the Government that information must be suppressed without insisting that that claim be "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States* v. *Reynolds, supra,* 345 U.S. at 7-8. It is not clear in the present case whether the claim should be lodged by the Secretary of Defense or by the Secretary of State, or both, but it is clear that *neither* has done so. Instead, the claim has been lodged only by the General Counsel of the Department of Defense and, inferentially, by an Assistant Attorney General. The "head of the department" rule announced in the *Reynolds* case arose in the context of a tort action, not involving on the non-government side, any constitutionally protected interest, and certainly not an interest as important as freedom of the press or the public's right to know.

C. The Dissemination of the Historical Material at Issue in This Case Is Absolutely Protected Against Governmental Sanction

The constitutional principles underlying the prior restraint doctrine are rendered even more compelling in this case because dissemination of the material which the Executive seeks to suppress is absolutely protected, even from subsequent punishment, by the First Amendment.

Despite the fact that the historical and political documents at issue are central to the proper functioning of a representative democracy and are, therefore, entitled to the highest quantum of constitutional protection, the Executive argues that their publication violates Title 18 USC §793 (the Espionage Act).

Although the Executive has couched its Espionage Act argument in terms of national defense, it has been unable to convince any judge that the nation's military or security posture would be compromised by the publication of the remainder of the Vietnam Study. As Judge Gurfein noted after extensive *in camera* hearings, the "irreparable injury" which the Executive claims would flow from the Study's publication is merely acute embarrassment on the part of high government officials involved in decisions leading to the escalation of the war in Vietnam.

Thus, although the Government's contentions are phrased in the parlance of the 20th century, they carry ominous echoes of an earlier era when the United States asserted the power to punish as "seditious" the dissemination of ideas which it believed would be detrimental to the national interest by tending to bring the Government "into contempt or disrepute." (1 Stat. 596, July 14, 1798) (The Sedition Act). Stripped to its essentials, the Government's case

is little more than an exhumation of the unlamented Sedition Act, condemned by the Supreme Court—and by history—as contrary to the basic tenets of a free society. See *New York Times* v. *Sullivan*, 376 U.S. 254, 273-276 (1964).

The First Amendment itself was adopted against the background of widespread use of the common law of seditious libel to punish the dissemination of material embarrassing to the Government. From the trial of John Peter Zenger, 17 How. St. Tr. 675 (1735), to the adoption of the First Amendment, the founders had wrestled with the intolerable burdens which seditious libel imposed upon a free press.[9] See, generally, Levy, *Freedom of the Press From Zenger to Jefferson* (1966); Chafee, *Free Speech in the United States*, ch. XIII (1941); Emerson, *The System of Free Expression*, ch. V (1970). The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.

Indeed, if the Government can suppress information critical to the informed exercise of political judgment merely

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[9] The first prosecution for seditious libel after the adoption of the First Amendment was directed against Benjamin Franklin Bache, a grandson of Benjamin Franklin, whose newspaper, the Philadelphia Aurora, published the text of the Jay Treaty in 1795 while the Senate was considering it in secret. Bache died before he could be brought to trial. Prior to the instant case, the most recent attempt to invoke the laws of seditious libel against a newspaper involved Theodore Roosevelt's attempt to prosecute The New York World and the Indianapolis News in 1908 in connection with Joseph Pulitzer's scathing accusations of corruption surrounding the acquisition of the Panama Canal Zone. Nelson, *Freedom of the Press from Hamilton to the Warren Court* (1967). Before this case, it was widely believed that this Court's opinion in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) had applied the *coup de grâce* to seditious libel in the United States.

by invoking the shibboleth of national security, the basic commitment of this nation to free trade in ideas will be severely weakened. The assertion by the Executive that it may restrain the publication of the documents at issue here, combines the worst elements of the British licensing acts and the law of seditious libel. That such an assertion could have already succeeded in imposing a prior restraint of two weeks' duration is disquieting—but were it to prevail on the merits, it would be nothing short of a disaster.

II.

The District Courts were without jurisdiction to entertain the Government's application for injunctive relief to restrain First Amendment activities.

Throughout these various proceedings, the primary focus has been upon the clash between the First Amendment interests of the newspapers and the American public, and the Government's asserted claims of the national security. From the very outset, however, the defendants and the *amici* have urged a narrower, alternative basis for disposition of these cases, namely, that the District Courts lacked subject matter jurisdiction to entertain the Government's request for injunctive relief.

From the very first the Government has cast about for a jurisdictional theory of its case. Initial reliance on 28 U.S.C. §1345 was subsequently abandoned, the Government probably realizing that this section merely gives the United States authority to sue, but does not confer subject-matter jurisdiction in the particular case. Instead, the Government offered two additional, nonstatutory bases of juris-

diction: (1) the Government's inherent power to utilize the courts to "protect its interests," and (2) the ancillary theory of the court's authority to fashion implied, civil remedies from the criminal prohibitions contained in the Espionage Act, 18 U.S.C. §793(e).[10]

We submit that the judicially-created doctrine of inherent powers has not and cannot be invoked as a source of jurisdiction to seek to restrain the exercise of First Amendment rights. We further submit that the criminal statute invoked here does not represent the kind of comprehensive regulatory arrangement which has occasionally motivated this Court to imply a civil remedy which the Government could pursue.[11]

It is axiomatic that United States District Courts are courts of limited jurisdiction, dependent upon the Congress for affirmative and specific grants of power. See *Lockerty* v. *Phillips*, 319 U.S. 182 (1944); *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir.), *cert. denied*, 39 Law Week 3258 (1970); see generally, H. Hart and H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 312-340 (1953). Any claim that the federal courts have inherent jurisdiction sim-

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[10] In the *Washington Post* case, the Government additionally relied upon 11 D.C. Code §521 which provided general jurisdiction for the United States District Court for the District of Columbia. But it is doubtful that this statute was intended to allow a suit by the United States, and it is questionable whether such general jurisdiction is still retained by the District Court in light of the recent creation of the Superior Court of the District of Columbia. See, *Tatum* v. *Laird*, —— F.2d —— (D.C. Cir., 4/27/71), slip. op. at pp. 5-6, n. 5.

[11] Executive Order No. 10501 cannot provide a basis for jurisdiction. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

ilar to that possessed by common law courts must be scrutinized against this constitutional premise.

The primary source of the "inherent power" theory of jurisdiction is the Court's decision in *In Re Debs*, 158 U.S. 564 (1895), which stemmed from the massive Pullman Strike of 1894. The government had obtained an injunction against the strike in order to prevent the continued forcible obstruction of the "carriage of the mails". *Id.* at 577. The Court emphasized that the Constitution expressly granted Congress powers over interstate commerce and the maintenance of a postal system, and that Congress had extensively legislated to implement those responsibilities. Relying on two earlier decisions which had allowed the United States to sue to set aside fraudulently obtained patents, the Court found that the federal government had a sufficient proprietary interest in the mails to justify its application for injunctive relief (158 U.S. at 582-83).

But the Court articulated a broader rationale for its decision. It reasoned that the national government could use force to deal with the emergency: "The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails" (*id.* at 582). *A fortiori*, it could resort to its courts to accomplish the same objectives:

> Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The

> obligations which it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court (158 U.S. at 584).

A principle of this nature is potentially limitless. But fortunately it has been restricted in its application by subsequent decisions.

First, almost every one of the relatively few cases in which the Court has relied on the *Debs* principle, thus allowing the United States to seek injunctive relief despite the absence of a specific jurisdictional statute, has involved specific and limited obstructions to the modes of interstate commerce such as navigable rivers. See, *e.g., Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191 (1967); *United States* v. *Republic Steel,* 362 U.S. 482 (1960); *Sanitary District of Chicago* v. *United States,* 266 U.S. 405 (1925) (all involving navigable waterways). More recently, lower courts have held this principle to encompass those burdens on interstate commerce imposed by racial discrimination in transportation facilities. See, *e.g., United States* v. *City of Jackson,* 318 F.2d 1 (5th Cir. 1963); *United States* v. *City of Shreveport,* 210 F. Supp. 36 (W.D. La. 1962).

Secondly, the *Debs* principle has been limited to areas where there were comprehensive and remedial federal statutory arrangments, and where a clear legislative purpose would be served by allowing the United States to seek civil relief of a specific kind. See, *e.g., Sullivan* v. *United States,* 395 U.S. 169 (1969); *Wyandotte Transportation Co.* v. *United States, supra; United States* v. *Arlington County,* 326 F.2d 929 (4th Cir. 1964) (both involving the Soldiers' and Sailors' Civil Relief Act). Such cases have often in-

volved the proper adjustment of federal-state relationships with regard to federal personnel or programs. See, *e.g.*, *Paul* v. *United States*, 371 U.S. 245 (1962); *Sullivan* v. *United States*, *supra*; *cf. United States* v. *Brittain*, 319 F. Supp. 1058 (N.D. Ala. 1970).[12] In sum, *Debs'* progeny has been limited primarily to suits seeking vindication of the pervasive national power under the Commerce Clause, effectuation of the purposes embodied in systematic statutory arrangements, or frequently both. Thus, it is one thing for the Court to accept the Government's claim of inherent power when that claim is invoked to enforce a specific constitutional provision (the Commerce Clause). It is quite another thing, when the claim of inherent power is invoked to defeat or abridge a specific constitutional provision (the First Amendment).

Research has disclosed no case where inherent or nonstatutory jurisdiction was claimed by the Government as a basis for injunctive relief where First Amendment rights were interposed by the defendant. The absence of such cases is readily understandable. First, of course, any such attempt to enjoin arguably protected First Amendment activity runs immediately afoul of the clear prohibition on prior restraints. See Point I, *supra*. Moreover, the values embodied in the First Amendment are themselves affected with an overriding public interest as compelling as the Government's claim of national security. For, unlike most

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[12] *Brittain* also reflects the use of the concept of nonstatutory jurisdiction to allow the United States to take action against states or their surrogates on behalf of individuals who have clearly been denied constitutionally protected rights. See, *e.g.*, *United States* v. *Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970) (also involving protection of interstate commerce); *United States by Katzenbach* v. *Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965) (three-judge court).

other constitutional protections, the safeguards of the First Amendment, particularly the guarantee of a free press, were designed to insure the proper functioning of our political democracy. As the Sixth Circuit said, in rejecting a similar claim of "inherent powers", "[b]eyond doubt the First Amendment is the cornerstone of American freedom". *United States* v. *United States District Court*, —— F.2d ——, 39 Law Week 2574, 2575 (1971). The granting of inherent, nonstatutory power may be acceptable to support an injunction against depositing wastes in a navigable stream. But where the First Amendment and the fundamental societal policies it embodies are interposed, they constitute a limiting principle on the application of such an elusive and open-ended jurisdictional concept.

In addition, our suggestion that this is a singularly inappropriate occasion to allow injunctive jurisdiction where none has been conferred by the Congress is bolstered by the settled principle that equity will not enjoin criminal conduct. See *United States* v. *Jalas*, 409 F.2d 358 (7th Cir. 1969); see generally, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 996, 1013-1018 (1965). None of the three exceptions to this general principle is applicable here. The first encompasses situations of widespread national emergency of the kind involved in *In Re. Debs.* There has been no contention by the Government that this exception is applicable. The second exception deals with actions seeking to abate a public nuisance. *In Re Debs* and *United States* v. *Republic Steel Corp., supra,* cases involving inhibitions on interstate commerce, can be assimilated to this principle. It too is not relevant here.[13]

[13] As Justice Harlan has noted, *Debs* "stands simply for the proposition that the Commerce Clause gives the Federal Government standing to sue on a basis similar to that of private individuals

The third exception comes into play when a statutory arrangement specifically or impliedly authorizes such civil relief. This Court has occasionally implied a civil remedy out of a comprehensive statutory scheme in order to effectuate the remedial purposes of that legislation. See, *e.g.*, *Wyandotte Transportation Co.* v. *United States*, *supra*. Moreover, since the criminal penalties imposed by such legislation were usually "meagre", the normal equity rule gave way in favor of granting the kind of essentially civil remedy contemplated by the statute. See, *e.g.*, *United States* v. *Republic Steel Corp.*, *supra*. Here, however, Congress expressly refused to afford civil remedies when it passed the Espionage Act. *Cf. United States* v. *Jalas*, *supra*. See Point III, *infra*. And the criminal penalties rather than being meagre are severe. Finally, the very vagueness of the criminal statute from which the Court is urged to imply an injunctive remedy reflects the wisdom of equity's traditional reluctance.

In sum, the inherent powers jurisdiction rule of *Debs* has not had an expansive history and has never been applied when First Amendment rights are involved. Moreover, the Espionage Act is not the kind of statute from which civil remedies should be implied. The only proper avenue of redress for the Government is to prosecute criminally those who it believes have violated its laws.

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under nuisance law". *United States* v. *Guest*, 383 U.S. 745, 769 (1966). Indeed, even in *Wyandotte*, this Court left open the question of whether the United States still has a nonstatutory inherent right to bring such an injunctive suit (389 U.S. at 196, n. 5, 201).

III.

The only statute relied upon by plaintiff, 18 U.S.C.A., Section 793, provides no authority for relief in this case.

A. The Act Does Not Authorize Prior Restraint of the Press

The only statutory authority cited by plaintiff for the extraordinary relief sought herein is 18 U.S.C.A. §793. That statute, in its present form and wording, was enacted on September 23, 1950 by section 18 of Chapter 1024 of the acts of the 81st Congress, 2nd Session, reported at 64 Stat. 987, 1003-1005.[14] Section 1(b), of the act, reported at 64 Stat. 987, provides:

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." [15]

Congress, sensitive to the importance of a free press[16] carefully prefaced the act with an express disavowal of

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[14] Chapter 1024 was known as the "Internal Security Act of 1950," and was divided into two Titles. Title I, of which section 18, now section 793 of the Code, was a part, was known as the "Subversive Activities Control Act of 1950".

[15] Section 1(b) is printed also in 1950 *U.S. Code & Cong. Serv.* 984.

[16] Indeed, the express purpose of the act was to protect this country from "totalitarian" forms of government which would deny those "fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press . . ." Chapter 1024, section 2(2), 64 Stat. 987.

any intent to authorize a prior restraint, or in any way to limit freedom of the press. The Government may, if it chooses, attempt to prosecute defendants under section 793, but it may not invoke section 793 as authority for an entirely different type of remedy, a remedy which Congress expressly proscribed.

The legislative history, reported in 1950 *U.S. Code & Congressional Service,* 81st Cong., 2nd Sess. at pp. 3886-3922 (cited hereafter as "Code Service"), reveals that the act's prohibition of prior restraint was a carefully considered legislative response to problems which Congress realized were of constitutional dimension, as we have demonstrated above. House Report No. 2980 phrased the problem as follows (Code Service, p. 3888):

> "The [House] committee approached the problem with care and restraint because it is believed essential that any legislation recommended be strictly in accordance with our constitutional traditions. How to protect freedom from those who would destroy it, without infringing upon the freedom of all our people, presents a question fraught with constitutional and practical difficulties. We must not mortally wound our democratic framework in attempting to protect it from those who threaten to destroy it."

But the House bill, though it was careful not to *authorize* prior restraint, did not expressly prohibit it, an omission the Senate considered objectionable. The Senate therefore passed a bill containing the "additional language" now found in section 1(b) of the Act.[17] The "managers on the

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[17] Senate Report No. 2369, to accompany S. 4037, 81st Cong., 2d Sess., at p. 3.

part of the House" (Code Service, p. 3899), one of whom was the Hon., now President, Richard Nixon (Code Service, p. 3922), agreed to the Senate's language, and the Conference Report recommended the enactment of the Senate language (Code Service, p. 3900).[18]

In *United States of America* v. *The Washington Post Company, et al.*, —— F. Supp. ——, (D.D.C., Civil Action No. 1235-71, June 18, 1971), Judge Gerhard Gesell, in denying the government's request for a temporary restraining order, relied upon section 1(b): "18 U.S.C. §793 provides for possible criminal sanctions in these circumstances but Congress in that state did not authorize any injunctive action. Indeed, Congress appears to have condemned any pre-existing restraint or censorship of the press by the language of the Internal Security Act of 1950 (Sec. 1(b), of which this statute is a part . . . ."

B. Section 793 Does Not Authorize Relief.

Even if the Internal Security Act, of which section 793 in its present form is a part, could be construed not to prohibit prior restraint of the press, section 793 would still not authorize relief.

1. ***Subdivision (d) of section 793 is, by its terms, inapplicable.***

The Government's own papers demonstrate conclusively that subdivision (d) is inapplicable. Subdivision (d) applies only to persons "lawfully having possession of", or lawfully intrusted with documents "relating to the national

[18] The Conference Report and the report of the House Managers were eventually read on the floor of the House. *Congressional Record—House*, Vol. 96, Part II (September 20, 1950), pp. 15265, 15279-15280.

defense." The complaint, paragraphs "4" and "5", alleges that defendants "without lawful authority obtained" the documents at issue herein. And paragraph "4" of the Buzhardt affidavit alleges that the *Times* "was not authorized . . . to have possession" of said documents. Accordingly, the Government cannot even claim, much less prove, that defendants' possession was "lawful", the prerequisite to relief under subdivision (d).

2. *Subdivision (e) of section 793 is, by its terms, inapplicable.*

a. Subdivision (e) does not purport to cover classified documents or information.

An entirely different section of the Act—§798—deals expressly and exclusively with dissemination of "classified" material. Subdivision (e) of §793, which carefully specifies the types of subject matter proscribed, does not use the word "classified." Clearly that subdivision is inapplicable when the very essence of plaintiff's case is that the Vietnam Study is a classified document.[19]

b. Subdivision (e) does not purport to cover publications.

Both subdivision (e) and §798 proscribe any attempt to "communicate" or "transmit" certain types of information, but subdivision (e), unlike §798, does not expressly proscribe "publication." Congress clearly viewed "communicate," "transmit" and "publish" as dis-

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[19] "Where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis", and no other. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring).

tinct acts, and whatever Congress intended to proscribe by the word "publish", a question difficult enough in itself, it did *not* intend to proscribe under subdivision (e). If the acts which the Government seeks to enjoin would constitute "publication", then its reliance upon §793 (e) is misplaced. Although §798, which speaks of the "publication" of "classified information" would seem, at first blush, to be the more applicable of the two sections, the Government no doubt decided not to rely upon §798 because the materials at issue here do not even arguably fall within one or more of the four types of classified information whose publication is proscribed by §798.

C. If Section 793 (e) Is Applicable, It Is Unconstitutional.

Section 793 (e) is, for a criminal statute, remarkably vague. The first part of the statute is predicated upon unauthorized possession of various "documents" and other tangible items. The second part speaks of unauthorized possession of "information". The "information" clause expressly requires that the possessor of the information have "reason to believe" that the information he possesses "could be used to the injury of the United States or to the advantage of any "foreign nation", but the "document" clause does not expressly require "reason to believe" that the documents "could be used to the injury of the United States", etc. If the "reason to believe" requirement does *not* modify the "document" clause, then the "document" clause either establishes a criminal presumption that the possessor intends injury—a presumption which would clearly be unconstitutional under the test for criminal presumptions announced in *Leary* v. *United States,* 395 U.S. 6, 33 (1969)—or the "document" clause proscribes

the possession and communication of documents whose publication the possessor need not even suspect could, or would, be injurious to the United States.

The latter interpretation would render the statute void. *Gorin* v. *United States*, 312 U.S. 19, 27-28 (1941). And it is the latter interpretation which finds support in the legislative history. *E.g.*, Senate Report No. 2369, to accompany S. 4037, 81st Cong., 2d Sess., at pp. 8-9, amending §793(d).

On the other hand, if the "reason to believe" requirement *does* modify the document clause, a questionable construction, then the Government must come forward with *evidence*, not mere assertions, sufficient to prove that the defendants (that is, in effect, The New York Times and the Washington Post) acted in "bad faith," having reason to believe that the documents (or information) could be used to the injury of the United States. The possibility of such proof is obviated by the Government's concession during oral arguments that the defendants "acted in good faith."

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and the case remanded to that court with instructions to enter a judgment affirming the judgment of the District Court.

The judgment of the United States Court of Appeals for the District of Columbia should beaffirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1885

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE WASHINGTON POST COMPANY, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE RESPONDENTS

QUESTIONS PRESENTED

In this case, in which the Government seeks a reversal of an order affirming denial of a preliminary injunction, the questions presented are:

1. Whether the District Court clearly abused its discretion when it denied the Government's motion to enjoin, *pendente lite,* The Washington Post (hereinafter "the Post") from publishing documents and in-

formation drawn from a classified historical document on the involvement of the United States in the Vietnam conflict where the District Court, on a concededly full record, found that the Government had failed to demonstrate that publication would constitute a threat to national security?

2. Should this Court review the holdings below when there has been no claim by the Government (a) that the findings of the District Court were "clearly erroneous" or (b) that the Government did not have an opportunity fully and fairly to present its case?

3. Would the issuance of a preliminary injunction in the circumstances of this case constitute a prohibited prior restraint within the meaning of *Near* v. *Minnesota*, 283 U.S. 697?

4. In view of the widespread publication of the contents of the Vietnam History by other newspapers throughout the United States against which the Government has chosen not to proceed, should this Court now direct dismissal of this case because the issuance of injunctive relief would be futile?

STATEMENT OF THE CASE

Thirteen days ago, The New York Times ("the Times") began publication of a series of articles based upon the contents of a document entitled "History of U.S. Decision Making Process on Vietnam Policy" (the "Vietnam History"), covering the period from 1945 to March, 1968, which was prepared in 1967-68 at the direction of then Secretary of Defense Robert McNamara.

After the Times had published three installments of its series, the Government filed suit against the Times

to enjoin publication of the balance of the series, and, on June 15, obtained a temporary restraining order prohibiting further publication.

On June 18 and 19, the Post published two articles derived from portions of the Vietnam History. This action ensued.

The Government's suit against the Post commenced on the evening of June 18 with an application by the Government to the District Court for a temporary restraining order prohibiting further publication of any material derived from the Vietnam History. In this connection, the Government represented to the District Court that continued publication of the Post's series would result in immediate and irreparable injury to the national defense.

The District Court, noting the absence of specificity in the Government's representations, denied the temporary restraining order on the authority of *Near* v. *Minnesota,* 283 U.S. 697. The Government took an immediate appeal. Responding to the Government's plea of urgency and irreparable injury, the Court of Appeals convened in extraordinary session late in the evening of June 18, and rendered its decision at about 1:30 a.m. on June 19.

A majority of the three-judge panel of the Court of Appeals held that, in view of the gravity of its charges, the Government should be given an opportunity to establish factually its claim that publication of the material would immediately and irreparably damage national security.

At the direction of the Court of Appeals, the District Court held an evidentiary hearing on June 21, 1971, at which the Government was given a full and fair oppor-

tunity to establish factually its claim. The hearing was for the most part held *in camera,* thus eliminating any inhibiting effect which a public trial could have on the proof to be offered in support of the Government's case.

Insofar as Respondents are advised, the Vietnam History consists of 47 volumes comprising approximately 7,000 pages of historic material anywhere from three to twenty-seven years old. The materials themselves consist of analyses and commentary, with supporting data, including cables, memoranda and other documents, newspaper clippings and transcripts of speeches by former public officials. As noted by the District Court, the Vietnam History includes "material in the public domain and other material that was Top Secret when written long ago but not clearly shown to be such at the present time." (Tr. 267) [1]

The documents in the possession of the Post are substantially fewer in number (approximately 4000 pages) and do not have the same pagination. The Post does not have a 1965 document entitled "Command and Control Study of the Tonkin Gulf Incident" prepared by the Defense Department's Weapons System Evaluation Group—a document apparently involved in the Government's case against the Times.

The entire 47 volume History is classified "Top Secret—Sensitive." The classification "Top Secret" [2] is defined by the Department of Defense as follows:

> TOP SECRET—The highest level of classification, TOP SECRET, shall be applied only to that in-

[1] References are to the transcript of testimony, since the record is not yet available to us.

[2] There apparently is no official "Top Secret—Sensitive" classification.

> formation or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in *exceptionally grave* damage to the Nation; such as, leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological development vital to the national defense. The use of the TOP SECRET classification shall be severely limited to information or material which requires the utmost protection. (emphasis supplied)

The record discloses that:

1. The overall classification of the Vietnam History was necessarily fixed by the highest classification of any source material on which it is based. By reason of this so-called "derivative classification" practice, such items as the public speeches of Presidents and other governmental officials are classified "Top Secret." (Tr. 16)

2. The originator of a document generally determines its classification; and this determination is not changed until and unless the classifier establishes conditions for automatic downgrading and declassification. (Tr. 30) Mr. McClain, the Security Classification Officer having prime responsibility for policing declassification, acknowledged that he received few requests for declassification of "Top Secret" documents. (Tr. 30) Similarly, Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asian and Pacific Affairs, testified that he rarely made recommendations that documents be declassified. (Tr. 55)

3. No attempt was made to segregate classified and nonclassified documents of the Vietnam History for

the purpose of avoiding overclassification (Tr. 16-17), nor had the Vietnam History been reviewed for purposes of downgrading and declassification. (Tr. 30-32) Mr. Doolin testified, however, that he had been reviewing the Vietnam History since 1969 in order to determine whether Senator Fulbright who had asked to see the study should be permitted access to it, and had recommended against making the Vietnam History available to the Senator. (Tr. 35-36)

In addition to evidence as to the classification process as related to the Vietnam History, there is evidence in the record that 15 copies were prepared, of which two went to former Secretaries McNamara and Clifford and two to the Rand Corporation. None were sent to the White House. (Lofdahl Aff. Pl. Ex. 1)[3]

The Respondents submitted eleven affidavits from reporters and editors of the Post to the effect that:

1. In the defense and foreign policy areas, the Government habitually overclassifies its documents. *See, e.g.*, the affidavit of Murrey Marder (Ds Ex. 6),[4] particularly at paragraph 15.

2. Government officials often disclose for publication, for various purposes, copies of classified documents or the contents of such documents; and the information thus disclosed is often published. *See, e.g.*, the affi-

[3] The Government also submitted affidavits *in camera* by Doolin, by William B. Macomber, Deputy Under Secretary for Administration of the Department of State (both of whom testified on cross-examination), by Lt. General Melvin Zais, Director of the Operations Directorate, Joint Staff, and by Admiral Gayler of the National Security Agency. This evidence is analyzed in Respondent's In Camera Analysis of The Evidence Submitted Under Seal.

[4] Respondents' exhibits are identified as "Ds Ex. —".

davits of Bernard D. Nossiter (Ds Ex. 9), Marylyn Berger (Ds Ex. 10), Ben Bagdikian (Ds Ex. 7), Chalmers Roberts (Ds Ex. 3) and Benjamin Bradlee (Ds Ex. 4).

3. Classified information disclosed to the press by Government officials has generally been handled by the press in a responsible fashion. *See, e.g.,* the affidavit of Ben Bagdikian (Ds Ex. 7, paragraph 5).

4. Because documents and information in the hands of the Government, particularly relating to national defense and foreign policy, are so extensively classified, it has become necessary for the press, in order to assure that the Government's version of events is accurate and complete, to secure from independent sources the content of classified information. *See, e.g.,* the affidavit of Murrey Marder (Ds Ex. 6), in which he says:

> "But a free press, if it is to remain free, cannot be bound by what the government disseminates in either classified or non-classified information; it must be free to test the validity of both by exercising its own resources to obtain contradictory versions of *both* types of information."

5. The information contained in the Vietnam History is largely confirmatory of material heretofore published. *See, e.g.,* the affidavits of Chalmers M. Roberts (Ds Ex 3, p. 7) and Murrey Marder (Ds Ex. 6, pp. 3-4).

The Opinions Below

On the full record developed before it, the District Court rejected all claims of the Government. More specifically, it held that:

(1) The Government had failed to prove that publication of material from the Vietnam History

would lead to any break in diplomatic relations, any armed attack on the United States or any of its allies, the revelation of any information respecting current troop movements, or any compromise of military or defense plans, intelligence operations, or scientific and technological materials;

(2) the Government had failed to demonstrate that publication of such material would result in any immediate, grave threat to the national security; and

(3) there was no likelihood that the Government would succeed on the merits.

In the light of these findings, the District Court held:

"Our democracy depends for its future on the informed will of the majority, and it is the purpose and effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate. The equities favor disclosure, not suppression. No one can measure the effects of even a momentary delay."

On appeal, the Government did not challenge as "clearly erroneous" any of the findings of the District Court; and, so far as we presently can determine, it does not challenge those findings here.

The Court of Appeals for the District of Columbia, sitting *en banc*, affirmed. After a careful review of the record made before the District Court, seven of the nine judges of the Court of Appeals (including the two judges who had granted the Government's application for a temporary restraining order) held specifically that "the government's proof, judged by the standard

suggested in *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931), does not justify an injunction." Two of the judges would have given the Government yet another opportunity to try to prove its case. Only one of them, Judge Wilkey, found in the record anything even remotely justifying a prior restraint under the *Near* v. *Minnesota* standard.

On June 24, the Government filed a petition for a rehearing *en banc* seeking from the Court of Appeals essentially the same relief which the Second Circuit had accorded it in the *Times* case. In denying this application (7-2), the Court of Appeals noted that the Government had had an adequate opportunity to establish its case; that the Government had been reviewing the documents since November, 1969, to determine whether they should be made available to Senator Fulbright; that the Government had been directed by the District Court to "focus on any specific document that would prejudice the nation's defense interests" (Opinion, June 24, 1971, p. 3); that the Government had specified and discussed several such documents; and that the District Court had found that disclosure of the specified documents would not be harmful, or that any harm resulting from such disclosure would be insufficient to justify an injunction. The Court of Appeals held:

> ". . . we are satisfied that the Government had appropriate opportunity to make the kind of showing appropriate to justify a prior restraint on the nation's historic free press. Its essential complaint is a dissatisfaction with our conclusion that it has not met its heavy burden of proof." (Opinion, June 24, 1971, p. 3)

The Court of Appeals considered whether comity required it to grant the Government's petition by reason

of the Second Circuit's decision in the *Times* case. It determined, however, that it must decide the Post case on its own record:

> "Considerations of comity may not properly be stretched unduly when what is involved is a prior restraint on the press [which] we do not find constitutionally authorized." (Opinion, June 24, 1971, p. 4)

The Court of Appeals adverted, also, to the fact that, while the Times and the Post were both under restraint, other newspapers throughout the country not so restrained were currently publishing stories based upon and derived from the Vietnam History. With respect to such publications, the Court noted (Opinion, June 24, 1971, p. 5):

> "The increasing disclosures increase our concern, expressed in our opinion yesterday, whether effective relief of the kind sought by the Government can be provided by the judiciary."

Immediately upon denial of its application for rehearing *en banc,* the Government applied to this Court for a stay pending further proceedings against the Times in the Southern District of New York. The most significant aspect of that application, for present purposes, was the absence of any request by the Government that the Post case be remanded for further proceedings in the District Court. The Government was apparently content to rest its case upon the record it had made below. Indeed, the Government has conceded that its record in this case is complete. It stated to this Court, in its "Opposition" to the Times' Vacatur Petition (p. 3):

> "... it [the Government] was unable to prepare as complete a submission as it could present with the

additional time it had available in the *Washington Post* case."

In our *in camera* brief, we demonstrate that none of the evidence, considered singly or collectively, establishes that publication of anything contained in or derived from the Vietnam History will result in any threat to the national security of the United States. Here, we discuss the constitutional and legal issues which, in our view, preclude the relief the Government seeks from this Court.

ARGUMENT

INTRODUCTION

Respondents cannot determine with certainty what questions the Government believes its appeal presents. Certainly, the sole question set forth in the Government's "Application for Stay" (p. 4) is not presented by this appeal: That question assumes, contrary to the findings of the two courts which have passed on the issue, that the Government has met its burden of establishing that publication of the contents of the Vietnam History would pose a grave and immediate danger to the national security.

The difficulty is compounded by the fact that the Government, in the course of this litigation, has continually shifted emphasis in respect of the legal grounds it claims support its right to injunctive relief. When the Government filed suit against the Times less than two weeks ago, it relied principally on 18 U.S.C. § 793 (*d*). By the time it filed suit against the Post a few days later, it had shifted reliance to Section 793 (*e*). At the hearing in the District Court on remand, the Government placed heavy emphasis on its alleged absolute right to classify its documents. In its brief to the

Court of Appeals the emphasis again shifted, this time to the President's power to conduct the foreign affairs of the United States. On oral argument before the Court of Appeals, however, primary emphasis was placed on a proprietary theory, analogous to private rights in literary property and the fiduciary obligations of private individuals. Finally, in its "Application for Stay" to this Court, the Government claimed an absolute right to determine "whether to declassify the material or to authorize its publication. . . ." (p. 2)

Whatever the theory upon which the Government is now proceeding, the facts are such that it cannot prevail: In the light of the findings below that publication of the contents of the Vietnam History would result in no substantial injury to national security, the general constitutional prohibition against prior restraints applies.

I. THE FINDINGS OF THE DISTRICT COURT MUST BE SUSTAINED UNLESS THEY ARE SHOWN TO BE CLEARLY ERRONEOUS.

It is important, at the outset, to comment briefly on the procedural posture of this case. It is hornbook law that, in any case—even a case in which no constitutional principles are at stake—a plaintiff may not obtain the extraordinary remedy of a preliminary injunction unless it can establish to the satisfaction of the Court, not only that it will probably succeed at the final hearing, but also that, absent preliminary injunctive relief, it will suffer grave and irreparable injury. *See, e.g., Industrial Bank of Washington* v. *Tobriner,* 405 F.2d 1321 (D.C. Cir. 1968); *Young* v. *Motion Picture Association of America, Inc.,* 299 F.2d 119 (D.C. Cir. 1962), *cert. den.* 370 U.S. 922 (1962).

The Government has failed to satisfy either of those requirements in the Courts below. Thus, even if this

were a non-constitutional case, the Government could not prevail.

In order to obtain reversal of the District Court's denial of preliminary injunctive relief, the Government, on such an appeal as this, is also required to show that the District Court clearly abused its discretion, *Brotherhood of L. E.* v. *Missouri-Kansas-T. R. Co.*, 363 U.S. 528, 535; *Young* v. *Motion Picture Association of America, Inc., supra; Cox* v. *Democratic Central Committee of District of Columbia*, 200 F.2d 356 (D.C. Cir. 1952); *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2nd Cir. 1969), *cert. den.* 394 U.S. 999, and that the findings of fact below were "clearly erroneous." Rule 52(a), F. R. Civ. P.; 5 Moore's Federal Practice ¶ 52.07 at 2732. *See, e.g., Cox* v. *Democratic Central Committee of District of Columbia, supra; Craggett* v. *Board of Education of Cleveland City Sch. Dist.*, 338 F.2d 941 (6th Cir. 1964). *See, also, Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489 (D.C. Cir. 1968); *United States* v. *Brown*, 331 F.2d 362 (10th Cir. 1964). The Government has never even claimed such abuse of discretion or that any of the findings below were erroneous.

This, however, is not an ordinary case. It constitutes a precedent-shattering attempt by the Government to impose a prior restraint which would prohibit the Post from publishing material of the highest political importance concerning the most critical issue facing this nation today. Where such First Amendment rights are involved, the Government bears a burden even greater than is normally the case, for the balance is always weighted in favor of free expression, especially where the proposed infringement involves a prior restraint, *Liberty Lobby, Inc.* v. *Pearson, supra.*

II. THE GOVERNMENT HAS FAILED TO PROVE AN IMMEDIATE AND GRAVE THREAT TO NATIONAL SECURITY.

In formulating the issue to be tried on remand, the Court of Appeals imposed upon the Government the burden of proving that publication of material from the Vietnam History "... would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as would justify restraining the publication thereof ... : See *Near* v. *Minnesota,* 283 U.S. 697, 715-16 (1931)" (Order, June 19, 1971).

The majority Opinion of the Court of Appeals directing remand establishes the nature of the irreparable injury which the Government was called upon to show. The majority stated that, although *Near* v. *Minnesota, supra,* generally prohibited prior restraints on publication, there was a "narrow area, embracing prominently the national security, in which a prior restraint on publication *might* be appropriate" and that "the instant case *may* lie within that area." The majority further noted that, in its view, the law permitted the issuance of "an injunction against publication of material *vitally affecting the national security.* In this case, the Government makes precisely that claim—that publication by appellees will *irreparably harm the national defense.*" (pp. 2-3, Emphasis supplied throughout).

On remand, the District Court observed that it had been directed by the Court of Appeals "to determine whether publication of material from this document would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as would justify restraining the publication thereof." (Tr. 266)

Near, itself, is also indicative of the gravity of the injury the Government was required to establish as an absolute minimum to justify a prior restraint on publication. That case speaks of "actual obstruction" to the Government's "recruiting service," the "publication of the sailing dates of transports," and "the number and location of troops." It seems obvious that the exception to the prohibition against prior restraint was conceived, in *Near,* as embracing only the most serious, immediate and substantial threats to the Government's ability to wage war, imminent risk of death to its military personnel, grave breaches of the national security, and the like.

No such injury was established here.

The District Court did find that publication of the documents "may" interfere with the ability of the State Department to conduct delicate negotiations but, significantly, such interference would result:

> "... not so much because of anything in the documents, themselves, but rather results from the fact that it will appear to foreign governments that this Government is unable to prevent publication of actual Government communications when a leak such as the present one occurs. Many of these governments have different systems than our own and can do this; and they censor." (Tr. 267)

Embarrassment to the United States because foreign governments do not fully comprehend the operation of the principles governing our free institutions is obviously not the kind of injury to the national defense which *Near* contemplated, or which this Court or any other Court should recognize as a reason justifying the abrogation of those hard-won liberties of speech and

press which are the envy of all whose freedoms are suppressed.

The District Court put the Government's case in its proper constitutional perspective when it stated (Tr. 271):

> "In interpreting the First Amendment, there is no basis upon which the Court may adjust it to accomodate [sic] the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting."

III. RESPONDENTS ARE NOT BOUND BY THE GOVERNMENT'S CLASSIFICATION SYSTEM.

It now appears that the Government, having failed to establish to the satisfaction of either of the Courts below that publication of material from the Vietnam History will in fact gravely and irreparably endanger the national defense, intends to reply upon the argument that it may, by its own *ipse dixit*, label or classify any of its documents "Top Secret" or "Secret"; that its decisions in this regard are not subject to challenge, judicial or otherwise, even where those documents come into the hands of third parties; and that the Government may thereby preclude publication of the contents of those documents. Thus, the Government conveniently seeks to relieve itself of the burden which the Courts below—and the Constitution—impose upon it.

We anticipate that the Government will argue, as it did in the District Court, that it has the statutory power to classify documents; that this power may be exercised by any designated governmental employee who need

never be named or produced;[5] and that once a classification has been imposed, it may not successfully be challenged even in a declassification proceeding unless it can be established that the Government's classification was arbitrary and capricious. This argument conveniently ignores the fact that we are not here involved with a declassification proceeding in respect of a document exclusively within the custody or control of the Government. This is a case where the Government seeks, through prior restraint, to preclude publication of material in the hands of a willing publisher who is neither an employee nor an agent of the Government.

We are here concerned with a constitutional case. The question is whether prohibition of publication of historical documents constitutes a violation of the First Amendment. The Government's use of labels—even "Top Secret-Sensitive"—does not relieve the Courts of their duty independently to determine, on the basis of the record made below, whether the injunction the Government here seeks would, if issued, impinge upon the Respondents' First Amendment rights. *Wood* v. *Georgia*, 370 U.S. 375, 386; *Craig* v. *Harney*, 331 U.S. 367.

As was said in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429:

> "... a state cannot foreclose the exercise of constitutional rights by mere labels."

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[5] In this case, for example, whoever classified the Vietnam History was not identified, much less submitted to cross-examination, despite the District Court's specific instruction that this individual appear.

In *New York Times* v. *Sullivan*, 376 U.S. 254, the Supreme Court said (at 285):

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S. Ct. 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennekamp v. Florida, 328 US 331, 335, 90 L ed 1295, 1297, 66 S Ct 1029; see also One, Inc., v. Olesen, 355 US 371, 2 L ed 2d 352, 78 S Ct. 364; Sunshine Book Co. v. Summerfield, 355 US 372, 2 L ed 2d 352, 78 S Ct 365. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 US 229, 235, 9 L ed 2d 697, 702, 83 S Ct 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

IV. MISCELLANEOUS CONTENTIONS OF THE GOVERNMENT.

We have already adverted to the various shifts of emphasis which have characterized the Government's legal position as this suit has progressed—shifts which, since we do not have the Government's brief, make it difficult to predict the legal arguments on which the Government will rely in this Court. Accordingly, we address ourselves briefly to the various miscellaneous contentions heretofore advanced by the Government at

one stage or another, without attempting to evaluate the emphasis the Government may place on those arguments here.

(a) 18 U.S.C. § 793(e)

Although the Government at one point relied on Section 793(e) of U.S.C., Title 18, as the sole statutory support for its application for a preliminary injunction, it ignored the fact that Congress, in amending that statute in 1950 provided in Section 1(b) of the amendatory statute that:

> "Nothing in this Act shall be construed to *authorize*, require, or establish military or *civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States* . . .". (P.L. 831, 81st Cong. 2d Sess. Sept. 23, 1950, c. 1024, Tit. I) (Emphasis supplied)

We also note that Judge Gurfein, in the *New York Times* case, has expressly held, for the many reasons set forth in his opinion, that Section 793(e) does not even apply to publications by newspapers. In any event, we do not see how Congress can, by legislation, set aside the mandate of the First Amendment.

(b) The "Property" Theory

In oral argument below, the Solicitor General claimed for the Government some sort of vague, undefined proprietary right in the *contents* of the Vietnam History; and the Government's claim to injunctive relief was analogized to injunctions against copyright infringements.

While it is unclear whether Congress could constitutionally grant to the Government a proprietary interest in its documents, *Wheaton* v. *Peters*, 33 U.S. (8

Peters) 591, 668, Congress has not done so. *Public Affairs Associates, Inc.* v. *Rickover,* 284 F.2d 262 (D.C. Cir. 1960), *vacated on other grounds,* 369 U.S. 111, *on remand,* 268 F.Supp. 444 (D.D.C. 1967). To the contrary, the copyright statute itself expressly provides that "No copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part, thereof . . ." 17 U.S.C. § 8. In short, Congress has dedicated to the public whatever historical content or literary property rights might otherwise reside in the Government. *Greenbie* v. *Noble,* 151 F. Supp. 45, 65-66 (S.D.N.Y. 1957).

This dedication is squarely grounded upon the right of the people to know. As noted in *Scherr* v. *Universal Match Corporation,* 297 F.Supp. 107, 110 (S.D.N.Y. 1967), *aff'd.* 417 F.2d 497 (2d Cir. 1969), *cert. denied,* 397 U.S. 936:

> "... the fundamental purpose underlying the prohibition [against Government copyrights] which is based on 'the necessity of wide public dissemination of the contents of materials produced by and relating to issues and problems of national interest * * * [which] policy is unquestionably a desirable one in a democracy, much of whose success is dependent on a well-informed public.' "

Reference to *Near* v. *Minnesota,* 283 U.S. 697, is apposite here. In that landmark case, this Court drew a clear distinction between an injunction to prohibit publication based upon the protection of private rights and an injunction suppressing speech when it said (p. 716):

> "Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity."

This distinction was reaffirmed by this Court little more than a month ago, in *Organization For A Better Austin* v. *Keefe*, 39 U.S.L.W. 4577, 4578 (May 17, 1971):

> "... Under *Near* v. *Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, *the injunction operates not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000.*" (Emphasis supplied)

Nor can an injunction be justified on the ground that the Government has some ephemeral right of a private nature, based upon the economic value of the information contained in the Vietnam History. *See, e.g., Pearson* v. *Dodd*, 410 F.2d 701, 707-08 (D.C. Cir. 1969) *cert. den.* 395 U.S. 947. Obviously, we are not dealing here with information which the Government prepared with a view to a sale for profit, nor is the Vietnam History an instrument of commercial competition analogous to patents, commercial secrets and industrial "know-how." The Government has never claimed that this proceeding was brought to prevent the dilution of any economic interest deriving from its alleged proprietary rights in the Vietnam History. The only reason the Government brought this proceeding was to suppress information contained in the Vietnam History—to deprive the general public of its contents.

(c) The "Stolen Documents" and "Breach of Trust" Theories

The Government seeks to buttress its claim for injunctive relief through employment of labels in lieu of proof: It describes the Vietnam History as having been illegally obtained and held by the Post without author-

ity. The Solicitor General, in the oral argument before the Court of Appeals, also made reference to a theory based upon what he termed a "breach of trust."

Assuming, *arguendo*, that the Government has a proprietary interest in copies of the Vietnam History made by a third party without the Government's knowledge or authorization, the record contains no evidence whatsoever which would support a charge that the Vietnam History was illegally obtained by the Post or its source.

In any event, how the Post obtained its copy of portions of the Vietnam History is essentially irrelevant on this appeal. As the Court of Appeals noted in *Pearson* v. *Dodd*, 410 F.2d at 705:

> ". . . where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained."

Relevant, also, are the observations of District Judge Holtzoff in *Liberty Lobby, Inc.* v. *Pearson*, 261 F. Supp. 726, 728-9 (D. D.C. 1966), *aff'd.* 390 F.2d 489 (D.C. Cir. 1968):[6]

> "The only matter that the Court has before it at this time is the question whether it may enjoin

[6] The Court of Appeals was not necessarily prepared to go as far as Judge Holtzoff, and found it unnecessary to pass on the issue. It noted by way of *dictum*. (p. 491):

> "Upon a proper showing the wide sweep of the First Amendment might conceivably yield to an invasion of privacy and deprivation of rights of property in private manuscripts. But that is not this case; here there is no clear showing as to ownership of the alleged private papers or of an unlawful taking and no showing that Appellees had any part in the removal of these papers or copies from the offices of Appellants or any act other than receiving them from a person with a colorable claim to possession."

newspaper men from publishing copies of documents or information contained in documents that the newspaper men consider newsworthy, merely because the information or copies were obtained by a breach of trust.

The Court is of the opinion that freedom of the press that is safeguarded by the Constitution and which is one of the basic features of American institutions, is not limited to such information as is personally obtained by newspaper men by observation or from official statements, or in any other open way. The mere fact that a newspaper man obtained information in a clandestine fashion or in a surreptitious manner or because someone unguardedly and unwittingly reveals confidential information, or even through a breach of trust on the part of a trusted employee, does not give rise to an action for an injunction. The courts may not review the manner in which a newspaper man obtains his information and may not restrain the publication of news merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral. It would be a far-reaching limitation on the freedom of the press if courts were endowed with power to review the manner in which the press obtains its information and could restrain the publication of news that is obtained in a way that the Court does not approve. If such were the law, we would not have a free press; we would have a controlled press. Such, however, is not the law.

Cases involving publication of letters in violation of a property right in them or in violation of a copyright are not in point. Here we are dealing with the freedom of the press."

(d) Freedom of Information Act

The Government argues that Respondents, prior to publishing any information contained in the Vietnam History, should have sought and obtained declassification pursuant to the procedures established by the Freedom of Information Act. (Memorandum in Support of Motion for Preliminary Injunction, p. 10) This is truly a "Catch-22" argument, since the Government also contends that the Vietnam History is not subject to declassification pursuant to the Freedom of Information Act. (Memorandum in Support of Motion for Preliminary Injunction, p. 13) In any event, some idea of the speed with which information may be obtained by those who pursue Freedom of Information Act procedures can be gleaned from *Epstein* v. *Resor,* 421 F.2d 930 (9th Cir. 1970), *cert. den.* 398 U.S. 965, where it appears that the plaintiff waited some three years or more only to learn that he could not obtain access to documents some twenty-four years old.

(e) The Inherent Power—Foreign Relations Argument

The Government apparently relies on the so-called "inherent power" of the President, deriving, in the circumstances of this case, from his responsibility for the conduct of foreign affairs. This theory is readily disposed of. As this Court made plain in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, the President has no such "inherent power." Nor may the President, in his role as the executor of the foreign policy of the United States, deprive American citizens, whether here or abroad, of the rights guaranteed them under the Bill of Rights. *Reid* v. *Covert,* 354 U.S. 1; see, also, *Kent* v. *Dulles,* 357 U.S. 116; *Murray* v. *Vaughn,* 300 F. Supp. 688, 703 et seq. (D.R.I. 1969).

V. THE GOVERNMENT'S ACTION SHOULD BE DISMISSED BECAUSE THE RELIEF SOUGHT, IF OBTAINED, WOULD BE FUTILE.

It has already become obvious that, despite the continuation of this ill-conceived litigation, the Government's efforts to suppress the truth will not prevail. Copies of all or substantial portions of the Vietnam History have already found their way into the hands of an undetermined number of persons outside the Government.

During the past seven days, the Boston Globe, the Chicago Sun-Times, the Baltimore Sun, the Los Angeles Times, and the Knight chain of newspapers, serving eleven major American cities—cities such as Philadelphia, Detroit and Miami—have all run stories based, apparently, on the Vietnam History. The Justice Department has taken no action to restrain any of these newspapers other than the Globe, and we understand that a Justice Department spokesman indicated the Government does not intend to do so.

Thus, one thing is certain: Public revelations of the contents of this controversial History will continue apace until it will all become available to the American public. Under the circumstances, no useful purpose is served by a continuation of this litigation, and for this reason, too, the decision of the Court of Appeals should be affirmed.

As the District of Columbia Court of Appeals said in *Dombrowski* v. *Burbank*, 358 F.2d 821 (D.C. Cir. 1966), *aff'd in part, rev'd in part on other grounds, sub nom. Dombrowski* v. *Eastland*, 387 U.S. 82, in which the Court refused to enjoin a member of a Senate Sub-committee from disclosing certain documents because other

members of the Sub-committee were not similarly sought to be enjoined, the Court said (p. 824):

> "'A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.' *Virginia Railway Co.* v. *System Federation No. 40,* 300 U.S. 515, 550, 57 S.Ct. 592, 601, 61 L. Ed. 789 (1937)."

Thus, even without regard to the First Amendment principles to which we have adverted, the decisions of the Courts below to deny injunctive relief should be affirmed. *See, e.g., Humble Oil & Refining Company* v. *Harang,* 262 F. Supp. 39, 43-44 (E.D. La. 1966); *Elliott* v. *Amalgamated Meat Cutters, Etc.,* 91 F. Supp. 690, 698 (W.D. Mo. 1950).

CONCLUSION

For the reasons assigned, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1873

NEW YORK TIMES COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1885

UNITED STATES OF AMERICA, PETITIONER

v.

THE WASHINGTON POST COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district courts and of the court of appeals are not reported.

JURISDICTION

The judgment of the court of appeals in No. 1873 was entered on June 23, 1971, and the petition for a writ of certiorari was filed on June 24, 1971. The judgment of the court of appeals in No. 1885 was entered on June 23, 1971, that court denied the government's petition for rehearing on June 24, 1971, and the petition for a writ of certiorari was filed on the same date. Both petitions for writs of certiorari were granted on June 25, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the First Amendment bars an injunction sought by the United States to prevent a newspaper from publishing material whose disclosure would pose a grave and immediate danger to the security of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of * * * the press * * *.

STATEMENT

These two cases grow out of two suits brought by the United States to enjoin the New York Times and the Washington Post from publishing any portion of the following documents: (1) a 47-volume study en-

titled "History of United States Decision-Making Process on Vietnam Policy", prepared in 1967-1968 at the direction of the Secretary of Defense, and (2) a single volume or document entitled "The Command and Control Study of the Tonkin Gulf Incident Done by the Defense Department's Weapons System Evaluation Group in 1965." All of this material is classified as "Top Secret-Sensitive," "Top Secret" or "Secret". As the cases come to this Court, however, the government is asking for a much narrower injunction: it now seeks to bar only the publication of a relatively small number of documents whose disclosure would pose a "grave and immediate danger to the security of the United States" (see *infra*, pp. 7-9).

1. *The New York Times case.* On June 13, 14, and 15 the Times published extensive articles dealing with the involvement of the United States in Vietnam; the articles admittedly were based upon the top secret and secret material whose further publication the United States is seeking to stop. The Times also indicated that it plans to publish further articles in the series, based upon the same sources. The Times declined a request by the Attorney General of the United States to cease further publication and to return the documents to the government. On June 15, 1971, the United States instituted the present suit seeking (1) an injunction against further dissemination or publication of the classified material and (2) an order requiring the defendants to return the material to the government. The government sought a temporary restraining order and a preliminary injunction, pending the final determination of the case.

On June 15, 1971, after a hearing, the district court (Judge Gurfein) entered a temporary restraining order, effective until 1 P.M. on June 19, 1971, or further order of the court. An extensive hearing was held on June 18, 1971, at which the court heard testimony by high-ranking government officials with respect to the injury to the national security and foreign relations of the United States that further dissemination or publication of the material would cause; some of the testimony was given *in camera*. The court also received affidavits from former government officials, publishers, lawyers, historians, and the chief of the Washington Bureau of the Times, submitted by the defendants, which contended that the material was improperly classified and concluding that its dissemination or publication would not have the adverse impact upon the national security or foreign relations that the government stated.

On June 19, 1971, the district court denied the government's request for a preliminary injunction. Later that day a judge of the court of appeals extended the temporary restraining order until noon on June 21, 1971, in order to give a panel of that court the opportunity to consider the government's application for a stay pending appeal. On June 21, 1971 the court of appeals continued the stay pending an *en banc* hearing on June 22, 1971. Following such hearing, the court entered the following order on June 23, 1971:

> Upon consideration by the court in banc, it is ordered that the case be remanded to the District Court for further *in camera* proceedings to determine, on or before July 3, 1971, whether dis-

closure of any of those items specified in the Special Appendix filed with this Court on June 21, 1971, or any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971, pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined, and to act accordingly, subject to the condition that the stay heretofore issued by this court, shall continue in effect until June 25, 1971, at which time it shall be vacated except as to those items which have been specified in the Special Appendix as so supplemented and shall continue in effect as to such items until disposition by the District Court.

2. *The Washington Post case.* On June 18, 1971, the Washington Post published the first of a series of articles also dealing with United States' involvement in Vietnam. These articles similarly were based upon the Defense Department studies. At about 5:00 p.m. on that day the United States filed a similar suit against the Washington Post and certain of its officers seeking to enjoin further dissemination or publication of those studies, and a return of the documents. After hearing, the district court (Judge Gesell) denied a temporary restraining order, but early in the morning of June 19, 1971, the Court of Appeals for the District of Columbia Circuit reversed and granted a stay. Pursuant to that court's order, the district court held a hearing on the government's application for a preliminary injunction on June 21, 1971. After an extensive hearing, at which the court heard testimony *in camera* by high-ranking government officials with

respect to the injury to the national security and foreign relations of the United States that further dissemination or publication of the material would cause, the court denied a preliminary injunction.

The district court found (Transcript, p. 267) that "publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world," and that the government had "demonstrated the many ways in which its efforts particularly in diplomacy will not only be embarrassed but compromised or perhaps thwarted" (Transcript, p. 269). The court held (Transcript, p. 271), however, that the government had not shown "an immediate grave threat to the national security" that "would justify prior restraint on publication", a conclusion apparently based on the fact that the government had presented "no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials" (Transcript, p. 269). The court ruled (Transcript, 271) that "the First Amendment in this case prohibits a prior restraint on publication" since "there is not here a showing of an immediate grave threat to the national security which in close and narrowly-defined circumstances would justify prior restraint on pub-

lication." On June 23, 1971, the court of appeals affirmed and the following day denied the government's petition for rehearing, which requested the court to modify its order to bring it into conformity with the order of the Second Circuit in the *New York Times* case.[1]

ARGUMENT

I. The First Amendment Does Not Bar A Court From Enjoining the Publication by A Newspaper of Articles That Pose A Grave and Immediate Danger to the Security of the United States.

A. *The First Amendment does not provide an absolute bar to any prior restraint upon the publication by a newspaper of particular material.*

1. The issue before the Court, although of great importance, is narrow. There is no question here of any blanket attempt by the government to enjoin the publication of a newspaper, or any attempt to impose a generalized prohibition upon the publication of broad categories of material. The only issue is whether, in a suit by the United States, the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a "grave and immediate danger to the security of the United States."

In the *Times* case, the Court of Appeals for the Second Circuit affirmed the district court's denial of

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[1] On June 22, 1971, the Boston Globe published the initial article in a similar series also based upon the Defense Department material. Early in the afternoon of that day the United States filed suit to enjoin further publication by that newspaper, and the district court granted a stay.

a preliminary injunction, except with respect to a limited group of documents: "those items specified in the Special Appendix filed with this Court on June 21, 1971, or any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971." (On June 25, 1971, the United States informed the Post and the Times of the additional items it was specifying.) As to those documents, the court continued the preliminary injunction, but remanded the case for the district court to determine, in further *in camera* proceedings, whether any of those specified items met the standard of "grave and immediate danger" to the national security. The government has not sought review of the portion of the judgment of the court of appeals that otherwise affirmed the denial of the preliminary injunction.

In the *Post* case, the government similarly has not challenged the court of appeals' affirmance of the district court's denial of the preliminary injunction, except insofar as that court declined to impose the same condition as the Second Circuit had imposed in the *Times* case. In other words, the government is urging only that the Post should be prohibited from publishing those materials within the categories specified by the court of appeals in the *Times* case that pose a "grave and immediate danger" to national security.

The answer to this narrow question does not depend upon the fact that all of the material whose publication the government is seeking to prevent is classified either "top secret" or "secret", that all of it was obtained illegally from the government and that both the Times and the Post hold such material

without any authorization from the government. For whatever the classification this material has, and however the newspaper may have come into possession of it, we submit that the First Amendment does not preclude an injunction preventing the newspaper from publishing it.

The standard adopted by the Second Circuit is that of "grave and immediate" danger to national security. Since the effect of particular action upon diplomatic relations may be extremely severe in the long run even though its immediate impact is not clear or great, we believe that, insofar as this standard involves the conduct of foreign affairs, the word "immediate" should be construed to mean "irreparable." Indeed, in the delicate area of foreign relations frequently it is impossible to show that something would pose an "immediate" danger to national security, even though the long-run effect upon such security would be grave and irreparable.

2. The only case in which this Court has considered whether the First Amendment bars an injunction against the publication of a periodical was *Near* v. *Minnesota*, 283 U.S. 697. The Court there struck down, as violating the prohibition in the First Amendment against a law abridging the freedom of the press, made applicable to the states by the Fourteenth Amendment, an injunction granted by a state court against the publication of an anti-Semitic periodical, under a Minnesota statute permitting the suppression of newspapers or periodicals as public nuisances. Although the Court held that this statute, sanctioning the "suppression of the offending newspaper or pe-

riodical" (p. 711), was unconstitutional as a "previous restraint" upon publication, the Court recognized (p. 716) that under the First Amendment "the protection even as to previous restraint is not absolutely unlimited. * * * No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." These examples were merely illustrative and obviously there are other items of information so vital to the security of the United States that their publication may be enjoined. The exception to the prohibition upon prior restraint recognized in *Near* v. *Minnesota* surely covers material whose publication would pose a "grave and immediate danger to the security of the United States."

3. A form of prior restraint of specifically delimited categories of communication has also long been utilized in cease-and-desist orders issued by regulatory agencies, and enforced by the courts, in remedying violations of federal regulatory statutes. For example, in *Federal Trade Commission* v. *Texaco, Inc.*, 393 U.S. 223, this Court upheld the Commission's determination that sales-commission arrangements between an oil company and a tire manufacturer constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, and ordered enforcement of the Commission's order which, *inter alia*, restrained Texaco from "[u]sing or attempting to use any * * * device, such as, but not limited to, * * * dealer discussions * * *, to sponsor, recommend, urge, induce, or otherwise

promote the sale of TBA products by any distributor or marketer of such products other than The Texas Company to or through any wholesaler or retailer of The Texas Company petroleum products * * *." *Federal Trade Commission* v. *Texaco, Inc.*, No. 24, O.T. 1968, I App. 231. Respondents' contentions in this Court in *Texaco* based upon the First Amendment (Resp. Br. 29-31) were not discussed in the Court's opinion.

Similarly, in *Sinclair Co.* v. *National Labor Relations Board*, 395 U.S. 575, this Court upheld, against "petitioner Sinclair's First Amendment challenge" (395 U.S. at 616), the Board's setting aside of a representation election because of the coercive nature of the employer's communications to its employees during the election campaign. The Court unanimously affirmed the court of appeals' judgment enforcing the Board's order, including a provision requiring Sinclair to cease and desist from "[t]hreatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the above-named, or any other, labor organization as their collective-bargaining representative." *Sinclair Co.* v. *National Labor Relations Board*, No. 585, O.T. 1968, App. 199.

In its opinion in *Sinclair*, the Court specifically recognized that an employer's free speech rights are subject to the limited restrictions necessary to protect "the equal rights of the employees to associate freely * * *" (395 U.S. at 617). We submit that a carefully limited restriction on the right of newspapers to pub-

lish secret government documents is similarly warranted in order not to impede, by the threat that they might impair the very security of the Nation, communications of the greatest importance between the President and his advisers or between our government and other governments. Within the confines of the First Amendment, newspapers are, of course, subject to the same legal remedies as are other persons and business organizations. Indeed, this Court held in *International News Service* v. *Associated Press*, 248 U.S. 215, that, in appropriate circumstances, a news organization can, and should, be enjoined from disseminating or publishing particular materials.

4. Another, and very common, example of the use of prior restraints on publication by the courts is in enforcing statutory copyrights and—of particular relevance here—the common law right of literary property.

At common law, the author of a literary product has a protected property right in the unpublished work. The common law right guarantees the author the exclusive use of the product before publication. "He has the sole and exclusive right to perform, dramatize, or copy the production until he permits a general publication, as well as the exclusive right of first general publication." Copyright and Literary Property, 18 Am. Jur. 2d Sec. 9, pp. 311-312. See *id.*, Secs. 6-16, Spring, *Risks and Rights in Publishing* 75-80; Copyright and Literary Property, 18 C.J.S. Secs. 4-16. The right continues to exist in the United States independently of comprehensive copyright statutes. See *Wheaton* v. *Peters*, 8 Peters (33 U.S.) 591;

Caliga v. *Inter Ocean Newspaper Co.*, 215 U.S. 182; *Ferris* v. *Frohman*, 223 U.S. 424; *Mazer* v. *Stein*, 347 U.S. 201. See also *Chamberlain* v. *Feldman*, 300 N.Y. 135.

Almost any intellectual production that had been put in tangible form was protected at common law. The nature of the right to literary property in large measure dictated the remedies invoked by the courts for its protection. Only equitable relief could fully protect the author's privilege of first publication. To protect his rights, courts if necessary would prohibit all unauthorized uses, including publishing or printing. Compare *Belford* v. *Scribner*, 144 U.S. 488; Copyright and Literary Property, 18 Am. Jur. 2d Secs. 124-126; Copyright and Literary Property, 18 C.J.S. Secs. 16c, 120-124. Cf. *Folsom* v. *March*, 9 Fed. Cas. 342 (C.C. Mass.), where the court stated that "a court of equity will prevent the [unauthorized] publication [of copyrighted papers] by an injunction." *Id.* at 346. The courts in this country have continued through the subsequent years to provide injunctive relief against publications infringing statutory copyrights. See 18 C.J.S. Secs. 128-132; 18 Am. Jur. Secs. 131-134.

B. A court may enjoin a newspaper from publishing material whose disclosure poses a grave and immediate danger to national security.

The authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of

foreign affairs and his authority as Commander-in-Chief. Of course, if, as we shall argue, the government is entitled to such an injunction, there is no question that "the United States may sue to protect its interests." *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201.

1. *The President's power to conduct foreign affairs.* It has long and repeatedly been recognized that the President is constitutionally empowered to act with broad freedom and secrecy in the conduct of our relations with foreign powers. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304; *Chicago & Southern Air Lines, Inc.* v. *Waterman Corporation*, 333 U.S. 103; *United States* v. *Belmont*, 301 U.S. 324, 328; *United States* v. *Pink*, 315 U.S. 203, 229; *Oetjen* v. *Central Leather Company*, 246 U.S. 297, 302.

In *Curtiss-Wright*, *supra*, the Court explicitly held that there is a fundamental difference between the conduct of domestic and external affairs. It explained (299 U.S. at 319):

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613.

The Court also pointed out that Congress had reached the same conclusion (*Curtiss-Wright, supra*, at 319):

> "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how and upon what subjects negotiation may be urged with the greatest prospect of success . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." United States Senate, Reports, Committee on Foreign Relations, Volume 8, page 24.

This Court reaffirmed and further elaborated the *Curtiss-Wright* doctrine in *Chicago & Southern Air Lines, Inc.* v. *Waterman Corp., supra*, 333 U.S. at 111:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy.

> They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

These are not merely hortatory phrases without practical significance. For example, it would have been potentially disastrous had the sensitive, high-level negotiations involved in the "Cuban Missile Crisis" been conducted with the fear that what transpired in the utmost confidence—and necessarily so—might have been ultimately "published to the world." *Chicago & Southern Air Lines, Inc.* v. *Waterman*, *supra*, 333 U.S. at 111. On a less monumental level it is hardly an overstatement to suggest that the chance of success of the Nuclear Test Ban Treaty negotiations, or perhaps more immediately pertinent, the SALT negotiations, would have been, or would be, substantially diminished if the parties involved had feared that the necessary give-and-take of their informal conversations would at some future—and perhaps imminent—date be subject to close examination and scrutiny through general dissemination. It is self-evident, we submit, that the existence of such a possibility could not but impede the free flow of ideas and render positions rigid and immovable in any sensitive international negotiation.

In the subtle and difficult world of diplomacy, things often are said in confidence that will prove so embarrassing if disclosed that the mere threat of dis-

closure is enough to leave them unsaid. Sensitive negotiations often are carried on through people who, if they knew their identity might be disclosed, would be unwilling to participate. Neutral nations may play a role in involved negotiations that they would eschew if the fact of their participation were known. All of these activities are essential elements of the conduct of foreign affairs, which involve far more than direct face-to-face negotiations or the exchange of diplomatic notes. The publication of material relating to confidential discussions and negotiations between this country and both friendly and unfriendly powers would have the gravest consequences because it could dry up vital sources of information and thwart, if not sometimes destroy, meaningful communication.

2. *The President's Authority as Commander-in-Chief.* Under Article 2, § 2, cl. 1 of the Constitution, the President, as Commander-in-Chief of the armed forces of the United States, has not only the duty of conducting military operations, but also the duty of protecting "the members of the armed forces from injury, and from the dangers which attend the rise, prosecution, and progress of war." *Hirabayashi* v. *United States*, 320 U.S. 81, 93; see also *Prize Cases*, 2 Black 635. The latter responsibility includes the duty to preserve military secrets whose disclosure might threaten the safety of United States troops engaged in combat. For example, the President is empowered to prevent the disclosure by newspaper or otherwise of troop movements, secret military bases, or technical information vital to the production of

arms. Thus, during World War II, the President, "at his discretion, established rules and regulations for the censorship of communications by mail, cable, radio, or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country." Smith and Cotter, *Powers of the President During Crises*, p. 84. See Act of December 18, 1941, Section 303, 55 Stat. 838.

The classified material that was submitted to the district court in the *Post* case and that the government intends to submit to the district court on the remand in the *Times* case—significant portions of which are discussed in our sealed brief filed in this Court—demonstrates that publication of the Defense Department studies would pose a serious danger to the armed forces. Of course, it cannot be said with absolute certainty that this result would follow from publication. But the government need not show that such disastrous consequences are inevitable; it is enough that there be a real likelihood of the event. In the present cases high government officials have explained the reasons for their concern; that judgment is enough to support the Executive Branch's conclusion, reflected in the top secret classification of the documents and in the *in camera* evidence, that disclosure would pose the threat of serious injury to the national security.

The question whether the disclosure of military secrets would be so harmful as to merit prior restraint involves difficult and complex judgments which do not lend themselves to judicial resolution. This Court

recognized in *United States* v. *Reynolds*, 345 U.S. 1, that the President is uniquely qualified to determine whether the disclosure of "military and state secrets" would result in danger to the national security. Though the Court was not required in *Reynolds* to hold that the President's authority in this area is never subject to judicial review, the Court recognized that the national security may require the judiciary to play a very limited role in determining whether a particular occasion appropriately invokes the presidential power to prevent disclosure. Indeed, as Hamilton noted in discussing the power of Congress and the Executive to conduct military affairs:

> The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence. [*The Federalist*, No. XXIII, p. 147.][2]

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[2] This Court has also recognized, by analogy, that the power of the Commander-in-Chief to determine that an attack on American citizens or property has occurred, requiring the use of repellant force, is an exclusive power subject to review by neither of the co-equal branches.

> We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself. [*Martin* v. *Mott*, 12 Wheat. 19, 29-30.]

While, of course, the judiciary's duty to enforce the guarantees of the First Amendment cannot be abdicated, we submit that instances in which disclosure of particular state secrets would endanger troops in combat or otherwise imminently imperil the national security are among the "special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment," even from prior restraint. *Carroll* v. *Princess Anne*, 393 U.S. 175, 180.

Obviously, in circumstances like those here, the only effective means of protecting the nation against the improper disclosure of military secrets is to enjoin their impending publication. To limit the President's power in this regard solely to punishment of those who disclose secret information would render the power meaningless: the harm sought to be prevented would have been irreparably accomplished.

* * * *

Congress has recognized the authority of the President to protect the secrecy of information relating to foreign relations and national defense. The first exemption to the Freedom of Information Act, which generally provides for making public information in the hands of the government, specifically excepts from the statute's disclosure provisions "matters that are —(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. (Supp. V) 552(b)(1).

II. The United States Is Entitled to an Injunction Against Publication by the New York Times and the Washington Post of Material Whose Disclosure Would Pose A Grave and Immediate Danger to National Security.

A. *The Court of Appeals for the Second Circuit properly remanded the* Times *case to the district court to conduct an* in-camera *hearing on whether designated material poses such a danger.*

When the *New York Times* case was originally heard by the district court, the government, because of the short time it had to prepare for that hearing, was not able to present to the court all of the evidence relating to the impact of disclosure of this material upon foreign relations and national defense that it was able to present to the district court in the *Washington Post* case. It was on the basis of this limited evidence in the "*in camera* proceedings at which representatives of the Department of State, Department of Defense and the Joint Chiefs of Staff testified," that the district court concluded that it had not been convincingly shown that "the publication of these historical documents would seriously breach the national security," and that "no cogent reasons were advanced as to why these documents except in the general framework of embarassment previously mentioned, would vitally affect the security of the Nation." When the case reached the court of appeals, however, the government filed additional material relating to the effect of disclosure upon the national security. It was presumably the submission of this additional material that led the court of appeals to remand to the district court for a further hearing on whether disclosure of the specific items designated by that court

would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined." As we have already argued, the First Amendment does not bar an injunction against publication of material of that character.

The court of appeals directed the district court to render its decision on remand by July 3, 1971, which is one week from the date on which the Times is free to resume publication of these articles as a result of the court of appeals' affirmance of the other portions of the district court's order denying a preliminary injunction. The court of appeals did not abuse its discretion in giving the district court another opportunity to consider this important matter in the light of the additional evidence that the government had developed. The short additional period during which the Times remains under an injunction as to the designated documents represents a reasonable accommodation of, on the one hand, protecting the nation against the publication of material whose disclosure would threaten the national security and, on the other hand, the interest of the Times in publishing relevant information at the earliest possible date.

In another area where *Near* v. *Minnesota*, *supra*, recognized the propriety of a prior restraint upon publication—obscenity—recent decisions of this Court have recognized that such a prior restraint is permissible provided there is a prompt judicial determination of obscenity. The Court reaffirmed that principle only this Term. *United States* v. *Thirty-Seven Photographs*, No. 133, this Term, decided May 3, 1971.

To be sure, "obscenity is not within the scope of first amendment protection." *Id.* sl. op. at 13; *United States* v. *Reidel*, No. 534, this Term, decided May 3, 1971. But the basis of the requirement for speed in resolving disputed issues is a recognition that not all books or films seized as "obscene" will prove to be so; even though they constitute protected expression, restraint of their publication for the brief period necessary to decide the issue is countenanced. *Freedman* v. *Maryland*, 380 U.S. 51; *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43. In that context, where the element of social harm is admittedly speculative, *e.g.*, *Stanley* v. *Georgia*, 394 U.S. 557, this Court found a total restraint of 74 days for decision of the issue not constitutionally excessive. In this case, where the government believes it can show that publication of specific documents will bring about grave national harm, interim restraint for a much shorter period even of documents which a court might ultimately conclude do not fit that description is not constitutionally excessive.

B. *The Court of Appeals for the District of Columbia Circuit should have remanded the* Post *case for a further hearing like that ordered by the Second Circuit in the* Times *case.*

As noted in the Statement (*supra*, p. 6), the district court found in the *Post* case that "publication of the documents in the large may interfere with the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world" and that the government

had "demonstrated the many ways in which its efforts particularly in diplomacy will not only be embarrassed but compromised or perhaps thwarted." The court held, however, that the government had not shown "an immediate grave threat to the national security" that "would justify prior restraint on publication." This ruling apparently reflected the court's conclusion (Transcript 269) that the government had not established that the documents satisfied the standard that Executive Order 10501 specifies for "top secret" classifications—the court stated (*ibid.*) that the government had not shown that "the documents at the present time and in the present context are Top Secret." In the district court's view, the flaw in the government's case was that it had presented

> no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials.

That is not the proper standard for determining whether publication would pose a "grave and immediate danger" to the national security of the United States. Disclosure may pose such a danger even though it may not lead to a definite break in diplomatic relations, an armed attack on the United States or on an ally, a war or any of the other completely catastrophic events that the district court apparently concluded would have to be shown as certain to occur.

As we have discussed above, less calamitous consequences than those required by the district court may cause serious and irreparable damage to the vital interests of the United States in its dealings with foreign nations and in its defense posture. See the material in the government's sealed brief. Moreover, it is impossible to know where such events, once they are set in motion by improper disclosure, may lead. Relatively innocuous adverse consequences today may develop into serious and sometimes virtually insolvable problems in the future.

The determination of the particular classification that is appropriate for national defense purposes and whether and when that classification should be changed are matters of the highest sensitivity and difficulty; they require judgments based on wide knowledge of and familiarity with many interrelated factors. Whether a particular document requires a "top secret" classification, or whether that classification should be removed cannot be decided on the basis of a simple reading of the document. Material that seems relatively innocuous to the casual observer may, to one more familiar with the intricacies and intimate details of the situation, be revealed to have an entirely different significance. The kind of judgment involved in the proper classification of documents relating to the national security is one that courts simply are not equipped to make, and they should not attempt to make their own independent determination whether the particular classification was justified.

In its memorandum in opposition to the petition for certiorari, the *Post* contended that its case involves only the factual question whether the district court's conclusion that disclosure would not pose "an immediate grave threat to the national security" is supported by the record. To the contrary, we submit that that conclusion reflects not just a different evaluation of the evidence by the district court than by the government. The district court's ultimate conclusion, which the court of appeals approved, rests upon an improper standard of what the government is required to show in order to prevent publication of material whose disclosure would pose a grave and immediate danger to the United States.

CONCLUSION

The judgment of the court of appeals in No. 1873 should be affirmed. The judgment of the court of appeals in No. 1885 should be modified to conform it to the judgment of the court of appeals in No. 1873.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1873

LIBRARY
SUPREME COURT, U.S.

NEW YORK TIMES COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER, NEW YORK TIMES COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1873

NEW YORK TIMES COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit sitting *en banc* is reproduced in Appendix A to the Petition for Certiorari. The Opinion of the United States District Court for the Southern District of New York is reproduced in Appendix B to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals *en banc* was entered on June 22, 1971. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1). *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, a court may restrain a newspaper from publishing articles relating to public affairs.

2. Whether, consistent with the First and Fifth Amendments, the Court of Appeals may properly remand a case to the District Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs, where publication of the articles was not prohibited by any statute and where the basis for remand was the submission to the Court of Appeals of assertions of fact not before the District Court.

3. Whether, consistent with the First Amendment and the principle of separation of powers, the Court of Appeals may adopt a standard which permits the Executive to obtain injunctive relief against publication by a newspaper of articles relating to public affairs, in the absence of any statute enacted by Congress.

4. Whether a remand by the Court of Appeals to the District Court in a case in which the United States seeks to restrain publication by a newspaper of articles relating to public affairs, in which the Court of Appeals instructs the District Court to enjoin publication of items which "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined" is unconstitutionally vague and impossible of application by a court of law.

5. Whether, consistent with the First Amendment, the Court of Appeals may remand a case to the District

Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs in circumstances in which the United States at its request had been provided an *in camera* hearing to enable it to fully and frankly set forth its evidence, and at which hearing it had wholly failed to set forth evidence demonstrating any need for an injunction and where remanding the case would substantially delay publication of the news articles.

6. Whether, consistent with the First Amendment, the Court of Appeals may remand a case to the District Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs, where two District Courts had held, and a Court of Appeals held, that no irreparable harm would be suffered by the United States if such articles were published and that there was no reasonable certainty that the United States would succeed on the merits.

7. Whether, consistent with the First Amendment, a newspaper may be restrained from publishing articles relating to public affairs for a period of time of as much as eighteen days pending judicial hearing and determination whether the newspaper may publish the articles.

8. Whether, consistent with the First Amendment, a court may issue a temporary restraining order against the publication by a newspaper of articles relating to public affairs in the absence of a showing by the applicant that it was reasonably certain that the applicant would prevail on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, FIRST AMENDMENT:

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,

UNITED STATES CONSTITUTION, FIFTH AMENDMENT:

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE, TITLE 18 § 793(e)

Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United

States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

UNITED STATES CODE, TITLE 28

Federal Rules of Civil Procedure 52(a). *Findings by the Court*

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

On June 13, 1971, the New York *Times* commenced publication of a series of articles based upon two highly significant historical documents. One is a 7,000 page 1968 Pentagon study relating to Vietman entitled "History of U. S. Decision-Making Process on Vietnam Policy"; the other is a summary of a 1965 Defense Department study relating to the Tonkin Gulf incident. Together, they constitute a massive history of how the United States went to war in Indochina. The study was commissioned by Secretary of Defense McNamara in 1967 and completed in 1968. Its analysis is historical. Portions of it relate as far back as 40 years. None of it relates to a time period subsequent to early 1968.

On June 14 and June 15, 1971 two of the articles appeared in the *Times*. On June 15, 1971, the United States instituted in the District Court for the Southern District of New York an action to obtain an order enjoining the dissemination, disclosure or divulgence of the material in the possession of the *Times*, which was to be the basis of the continuation of the series of articles. The complaint prayed for the entry of orders, preliminarily and permanently, (1) restraining the *Times* from publishing the articles which the *Times* intended to publish relating to the origins of the United States involvement in Indochina during the period 1945-1968, and (2) directing the *Times* to deliver to the Government the documents upon which the articles were to be based. The *Times* and twenty-two officials and newsmen of the *Times* were named as defendants.

Simultaneously with the filing of the complaint, the Government applied for a temporary restraining order providing the relief prayed for in the complaint pending the issuance of a preliminary injunction. The application was accompanied by two affidavits. One described the demand

made by the Government to the *Times* to cease publishing the articles in question and to "return" the documents in question. The other by Mr. Fred Buzhardt, the General Counsel of the Defense Department stated that "[p]ublication of the said excerpts [from the Vietnam history] has prejudiced the defense interests of the United States and publication of additional excerpts or material from the aforesaid study would further prejudice the defense interest of the United States." (Buzhardt Aff. ¶ 2) The affidavit did not state how the defense interests of the United States had been or would be prejudiced, why the affiant believed the defense interests had been prejudiced or what qualifications the affiant had to speak with authority with respect to the defense interests.

On this basis and without more, the District Court on June 15, 1971, over the opposition of the *Times*, entered a temporary restraining order to expire at 1 P.M. on Saturday, June 19, and made the Government's motion for a preliminary injunction returnable on Friday, June 18.

On Friday, June 18 (the return day of the Government's motion for a preliminary injunction and at the opening of the hearing thereon), the Washington *Post* commenced publishing articles allegedly based upon the Pentagon study. Numerous newspapers, including the New York *Post*, reported accounts of these articles and even published them as did the national news wire services. Since the information and documents which the *Times* had been restrained from publishing had become publicly available, the *Times* moved at once to vacate the temporary restraining order and to dismiss the Government's action for mootness. The *Times* contended that, by virtue of the public disclosure of these documents in other newspapers, the hardship imposed on the *Times* by virtue of an unique prior restraint, and the corresponding limitation placed

solely upon its readers, the Government no longer possessed an arguably legitimate interest in either enjoining publication or in compelling delivery of the documents. The District Court reserved decision on petitioner's motion and proceeded to hear argument on the Government's motion for a preliminary injunction. Thereafter, a full evidentiary hearing was conducted. Based upon the Government's insistence that considerations of national security would not permit it to elicit testimony in a public courtroom, Judge Gurfein conducted a portion of this hearing *in camera*.

The Government offered the testimony of five witnesses in an effort to prove that further publication by the *Times* would work such irreparable harm to vital national security interests as could justify imposing a prior restraint upon the press. The Government introduced certain documentary evidence including copies of the two Pentagon studies involved. The witnesses were subjected to cross-examination in open court and *in camera*. At the conclusion of the hearing—which began at 10:00 A.M. Friday, June 18, and concluded at approximately 10:30 P.M. that evening—Judge Gurfein reserved decision on the motion for a preliminary injunction.

On Saturday, June 19, the District Court issued a 16-page Memorandum and Order denying the Government's motion for a preliminary injunction. The opinion reads in part:

> "For I am constrained to find as a fact that the *in camera* proceedings at which representatives of the Department of State, Department of Defense and the Joint Chiefs of Staff testified, did not convince this Court that the publication of these historical documents would seriously breach the national security. It is true, of course, that any

> breach of security will cause the jitters in the security agencies themselves and indeed in foreign governments who deal with us. But to sustain a preliminary injunction the Government would have to establish not only irreparable injury, but also the probability of success in the litigation itself. It is true that the Court has not been able to read through the many volumes of documents in the history of Vietnam, but it did give the Government an opportunity to pinpoint what it believed to be vital breaches of our national security of sufficient impact to contravert the right of a free press. Without revealing the content of the testimony, suffice it to say that no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned, would vitally affect the security of the Nation. In the light of such a finding the inquiry must end." (Memorandum and Order, pp. 12-13).

Aside from denying the Government's motion for a preliminary injunction, the District Court declined to enjoin the *Times* during the pendency of a Government appeal to the Court of Appeals, but did continue the restraint on publication "until such time during the day as the Government may seek a stay from a judge of the Court of Appeals for the Second Circuit." Later that afternoon, the Government filed a notice of appeal and applied to Circuit Judge Irving R. Kaufman for a further injunction pending appeal. This was denied, but Judge Kaufman did extend the restraint until noontime on Monday, June 21, to give the Government time to renew its application before a regular three judge panel of the Court of Appeals.

On June 21, 1971 the Government renewed its application before a panel composed of Circuit Judges Friendly,

Smith and Hayes. At that time the United States Attorney submitted a "Special Appendix" referring to, discussing and characterizing documents contained in the 47 volume history of the Vietnam War and containing broad conclusory statements, often phrased in present tense and containing data entirely outside the record before the Court, alleging *inter alia*, that national security would suffer if the documents were made public. The "Special Appendix" was prepared from affidavits apparently submitted by the United States in the Washington *Post* litigation.*

At the hearing on June 21, 1971, the Court of Appeals announced that the appeal by the United States from the opinion of Judge Gurfein would be heard by the Court sitting *en banc* on June 22, at 2:00 P.M. and continued the restraint on publication until the conclusion of the argument. On June 22, 1971, counsel to the *Times* moved to strike portions of the "Special Appendix." Oral argument was heard in the litigation on June 22.

On June 23, 1971, the Court of Appeals, by a 5-3 decision, ordered that the case:

> "be remanded to the District Court for further *in camera* proceedings to determine, on or before July 3, 1971, whether disclosure of any of those items specified in the Special Appendix filed with this Court on June 21, 1971, or any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971, pose such grave and immediate danger to the security of the United States as to warrant their publication being

*While the United States contended in the District Court that the "Special Appendix" was based upon affidavits of individuals in Government, it now characterizes the "Special Appendix", as "affidavits submitted by high government officials. . . ." (Memorandum for United States Re Vacatur Application, p. 3).

enjoined, and to act accordingly, subject to the condition that the stay heretofore issued by this court, shall continue in effect until June 25, 1971, at which time it shall be vacated except as to those items which have been specified in the Special Appendix as so supplemented and shall continue in effect as to such items until disposition by the District Court."

The effect of the decision of the Court was to affirm the decision of Judge Gurfein as to all arguments previously made before him by the Government, but to remand it to him for consideration of the new contentions put forth by the Government on June 21, 1971 in the "Special Appendix" and such new contentions as it might decide upon through June 25, 1971.

Judges Kaufman, Feinberg and Oakes dissented and stated that they "would vacate the stay and affirm the judgment of the Court below."

On June 24, 1971, the *Times* filed in this Court its petition for certiorari, motions for expedited consideration thereof and leave to file on typewritten papers and an application to Mr. Justice Harlan for vacatur of the stay provisions contained in the order of the Court of Appeals and for a stay of that Court's mandate.

On June 25, 1971, this Court granted the petition for certiorari, stayed the mandate of the Court of Appeals pending further order of the Court and directed the United States to serve the "Special Appendix" referred to and any additional items "as the United States may have specified with particularity" by 5 P.M. on June 25, 1971.

The Evidence Before the District Court

The Government Witnesses*

Four witnesses were heard in public session before Judge Gurfein, all called by the United States. Three of these witnesses testified that they were competent to discuss the effect of publication of the documents in possession of the New York *Times* on national security interests. The fourth, George MacClain, merely testified to the nature of the United States classification system.**

The most that can be said of the testimony of the three witnesses, Mr. Dennis James Doolin, Admiral Francis J. Blouin and Mr. William B. Macomber, in public is that insofar as it was relevant to the Government's case, it was so generalized and lacking in specificity that it could not conceivably be a basis for a prior restraint on free speech.

Mr. Doolin, Deputy Secretary of Defense for International Security Affairs, testified that his familiarity with the Vietnam volumes dated back only to November 1969 when he reviewed the study to propose a recommended response to Secretary of Defense Laird to a request of Senator Fulbright for the study (Tr. 56); and that he was not a part of the task force that prepared the Vietnam volumes

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*A separate statement sets forth in detail our view as to the lack of substance of the *in camera* testimony presented by the Government, as well as our comments with respect to the later submitted "Special Appendix" and additional materials proferred by the Government.

**Mr. MacClain, Director of the Security Classification, Management Division, in the Office of the Assistant Secretary of Defense and Administration, testified only as to the general scheme of classification of secret documents. He was not familiar with any of the specific documents involved in this case and was thus not qualified to testify as to the propriety of their classification or their supposed relationship to the defense interests of the United States. He was not even able to testify as to which security group the Vietnam volumes were placed in.

in 1967-1968 (Tr. 55). Mr. Doolin also testified that he had been involved with the Vietnam volumes frequently since November 1969 as a result of further and continuing requests of Senator Fulbright. With respect to the Tonkin Gulf report, Mr. Doolin testified that he first saw it after the commencement of the series of New York *Times* articles (Tr. 87).

Mr. Doolin indicated that he was qualified to testify as to whether or not public disclosure of the materials contained in the Vietnam study "would compromise the present or future military or defense plans, intelligence operations [or] jeopardize international relations of the United States." (Tr. 88-89). He did not do so in public.

Mr. Doolin also demonstrated the inability to testify to the interrelationship betweeen the classifications "top secret", "secret" and "confidential" and the groups 1 through 4 established by Executive Order, the latter referring to the automatic declassification system of documents. Except to say that some of the documents contained in the Vietnam volumes were either group 1 or group 4, Mr. Doolin was unable to state whether any of the documents were in groups 2 or 3 (Tr. 75).

On cross-examination, Mr. Doolin discussed the study he prepared in 1969 with respect to the desirability of continued secrecy of the volumes at that time for use by Secretary Laird in responding to the request of Senator Fulbright. In conjunction with this testimony, Mr. Doolin stated that as of the time of his 1969 recommendation to keep the volumes secret, he probably read 7 or 8 of the volumes in the Vietnam study and had surveyed the others (Tr. 132).

The public testimony of Admiral Francis J. Blouin, Deputy Chief of Naval Operations for Plans and Policy was no more specific than that of Mr. Doolin in demon-

strating any significant security interest to be preserved by preventing publication of the Vietnam volumes. With regard to the Tonkin Gulf study, Admiral Blouin testified that he believed that its publication "would compromise the present or future military or defense plans of intelligence operations of the United States." (Tr. 103). According to Admiral Blouin, a summary in the Tonkin Gulf report "gets into very intimate details on the command organization of the United States, and I feel that to go any further in describing that or the forces involved and how they are generated is very definitely damaging to the best interests of the United States." (Tr. 103).

With regard to the Vietnam volumes, Admiral Blouin testified that he had "little better than 24 hours" to get acquainted with the 47-volume Vietnam study (Tr. 104), but that he felt "quite well-informed now as to the content." (Tr. 104). Despite his obviously limited familiarity with the documents, Admiral Blouin concluded that "it would be a disaster to publish all of these other documents, let alone the ones that have already been published." (Tr. 104). Admiral Blouin further testified that he could detect things "already published by the *Times* that the ordinary layman would not detect, but I think as a matter of fact any intelligence organization will derive a great deal of benefit from the articles that have already been published, and there is even more juicy material in the other volumes." (Tr. 105).

However, Admiral Blouin did not specify or point to any item in the Vietnam study or the Tonkin Gulf report which would compromise the security of the United States or, for that matter, refer to any single document published in the New York *Times* to date which would do so.

Thus, in its entirety, the public testimony of Admiral Blouin amounted to no more than an assertion, without

explanation, that in his view neither the Vietnam study nor the Tonkin Gulf report should be published.

The last substantive witness called by the Government was Mr. Macomber, Deputy Undersecretary of State for Administration in the Department of State. Mr. Macomber testified that he had found excerpts of State Department classified documents published verbatim in the New York *Times* articles (Tr. 107). He further testified that publication of the Vietnam study would be "harmful diplomatically" because it would make private communication difficult with foreign nations (Tr. 112). Mr. Macomber testified that disclosure of the material contained in the Vietnam study would have an adverse impact on current diplomatic matters or treaty discussions (Tr. 113). However, in public session Mr. Macomber did not refer to any specific material (Tr. 113).

On cross-examination, Mr. Macomber acknowledged that he had become familiar with the Vietnam study only after its publication in the New York *Times* (Tr. 114). Mr. Macomber agreed that documents involving communications between nations are in fact published at later dates (Tr. 116), although he asserted that it was State Department policy to obtain the agreement of the nation involved before any public disclosure of documents. When questioned about the publishing of basic documents pertaining to American foreign policy, Mr. Macomber testified that the State Department had a regular program of reviewing such documents, but that they were presently up to documents dating only to the year 1946 (Tr. 117).

In the public testimony of the Government witnesses, there was a total absence of a single specific piece of evidence indicating that publication of the Vietnam volumes could damage the national security interests of the United States in any particular area. None of the three witnesses for the

United States referred to a single document in his open testimony, nor a single instance of prejudicing such defense interests. None, in his open testimony, suggested that the *Times* had published shipping dates, future military maneuvers, plans, weapon systems data, or the like. The most that can be said of the public testimony—and it may well be more than the testimony warrants—is that the witnesses attempted to lay a foundation for an effort in the *in camera* proceedings to show on a specific basis that there was in fact a genuine threat to national security posed by the publication of the historical documents contained in the Vietnam volumes.

EVIDENCE SUBMITTED BY THE TIMES

The *Times* submitted the affidavits of 16 persons.

Max Frankel, the Washington Bureau Chief and Washington Correspondent of the New York *Times* attested to the practice of officials in Government regarding disclosure of "secrets" to the press. Mr. Frankel's affidavit is replete with instances of Government officials, from the President and Secretary of State down to lower ranking officials "leaking" "classified" information to himself, with the knowledge that this information would be published in news stories appearing in the New York *Times*. Mr. Frankel, in his affidavit, also notes the abuse of "classification" of information in instances where the imposition of secrecy is motivated not by national security interests, but by political or bureaucratic convenience. In addition Mr. Frankel cites many instances of former high Government officials who revealed, in their memoirs matters not then officially "declassified". Mr. Frankel's belief, and the belief of other persons at the *Times* referred to in the affidavit, was that the two studies here involved constituted an historical record of

importance to the readers of the *Times* and to scholars, and it is this motivation, Mr. Frankel observes, that led to the decision to publish the articles of June 13, 14 and 15. These articles, and the articles contemplated by the *Times* have, in Mr. Frankel's view, no bearing on future military or diplomatic plans of the United States or any foreign nation.

The affidavits of Mr. Neil Sheehan, Mr. Hedrick Smith, Mr. Tad Szulc, Mr. Robert Smith, Mr. Walter Rugaber and Mr. John W. Finney (hereinafter referred to collectively as "Reporters' Affidavits") attest to the fact that each affiant is a reporter employed by the New York *Times* engaged in writing articles on military, national or international affairs and that each affiant has in the course of writing such articles used information, received from Government sources, which the Reporter knew or had reason to believe or suspect was classified. The Reporters' Affidavits also attest to the fact that it is not uncommon for Government personnel to make available to Reporters classified information. To a number of such Reporters' Affidavits are appended articles written by the affiant which incorporate information obtained from Government sources which the Reporter understood to be classified. In many instances the articles clearly indicate either expressly or implicitly that the information originated with a confidential or restricted source. Many of the Reporters' Affidavits aver that the affiant has never received any complaint from Government officials or agencies because of the use of such classified or restricted information.

The New York *Times* has also submitted affidavits from Theodore C. Sorensen, Francis T. P. Plimpton and Adrian Fisher. Each of these affiants was, for a considerable period of time, a high official within the Executive Branch of the United States Government and each has had continual exposure to classified documents. Each has

read and is familiar with the material printed in the New York *Times* on June 13, 14 and 15, 1971. These affiants attest to the fact that the material contained in these articles and the excerpts do not contain information which could result in injury to the national security of the United States. Messrs. Sorensen and Plimpton further aver that, as a result of their familiarity with the classification procedure they know that classifications "top secret" and "secret" can no longer be justifiably applied to material of the sort the *Times* has printed.

The *Times* has also submitted affidavits of James MacGregor Burns, Eric F. Goldman and Barbara W. Tuchman, each of whom is a well-known historian of great repute. Each of these affiants attested to the importance to historians of the type of material published by the New York *Times*, and to the essentially historical nature of that material. Professor Burns, in addition, from past experience in Government service (particularly in Army Intelligence and as a military historian) avers that Governments, both United States and foreign, tend to take an excessively self-protective and parochial view of the "security problem"; this results in a failure to make frank and early disclosure of historical events and thus reduces the ability of the public and governments to learn from mistakes of the past.

The *Times* has also submitted the affidavit of Arthur Ochs Sulzberger, President of the New York Times Company and publisher of The New York *Times*. Mr. Sulzberger avers that the decision to publish the material in question was made with the conviction that it was in the interest of the people of the United States that they be informed, and that it was the fundamental responsibility of the press to make such information available.

The *Times* has also submitted the affidavit of Sanford Cobb, President of the Association of American Publishers,

Inc. Mr. Cobb avers that the board of directors of the Association of American Publishers, Inc. adopted unanimously a resolution commending The New York *Times* for publishing the documents concerning the history of the United States involvement in Vietnam. The resolutions of the Board of Directors of the Association of American Publishers, Inc. also asserts that "the freedom to publish without prior restraint is of vital importance."

Finally, the *Times* has submitted the affidavit of Colbert Augustus McKnight, President of the American Society of Newspaper Editors ("ASNE"), with a membership of more than 700 directing editors of leading American daily newspapers. Mr. McKnight avers, on behalf of the Board of Directors of ASNE, that any order imposing a prior restraint upon publication "destroys a basic constitutional right of the people under a democratic government."

The Decision of the District Court

After reviewing all the testimony presented in the Court, both in public session and in the over four-hour long *in camera* session proposed by the Government, Judge Gurfein rejected each of the critical allegations of the Government addressed in the motion for a temporary injunction. The United States, the Court held, had failed to present enough evidence even to pose a "sharp clash" between supposed needs of security and the First Amendment. "[N]o cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned could vitally affect the security of the Nation."

The Court, as a finding of fact, held that the 47 volume history of Vietnam policy prepared in 1968 and the 1965 document relating to the Tonkin Gulf incident were prepared as historical documents by a group of historians.

The Court, in construing 18 U. S. C. § 793(e), upon which the United States then relied in seeking injunctive relief, closely examined the legislative history and setting of that section within the statutory scheme of the "Espionage and Censorship" Chapter 37 of Title 18 U. S. C. Judge Gurfein analyzed 18 U. S. C. §§ 792-799 as covering both "simple espionage" and publication of information. The Court concluded that 18 U. S. C. § 793(e) does not use the term "publishes", whereas other sections of Chapter 37 of Title 18 do employ that word. After a careful analysis of 18 U. S. C. §§ 792-799, Judge Gurfein concluded that § 793(e) "is truly an espionage section", and did not prohibit publication. Sections of the Chapter which do cover publication are plainly inapplicable on their face. Further, the Court held that the *Times* published its articles "in good faith", and with no intention to cause "injury to the United States or the advantage of any foreign nation." As a matter of law the Court concluded that 18 U. S. C. § 793(e) could not apply to the *Times* in this case.

After a thorough analysis of the legislative history of the Espionage Act of 1917 (uncontradicted by any contrary submission to the Court on behalf of the United States), the Court determined that Congress deliberately refused to include any form of precensorship in the Espionage Act.

As a finding of fact, the Court after the *in camera* proceedings*, held that the United States had not persuaded it that the publication "of these historical documents" could seriously compromise national security. Judge Gurfein noted that "no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned would vitally affect the security of the Nation".

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*Which were held, as Judge Gurfein noted, to provide the United States an opportunity to present its case forcefully and without restraint and to allow the United States to pinpoint specific breaches of national security.

The Court then concluded that even if § 793 could be applied to the *Times* in these circumstances, there was "no reasonable likelihood" of success by the Government because there was no basis for concluding that the *Times* willfully believed the material published "could be used to the injury of the United States or to the advantage of any foreign nation."

As for the Government's contention that the executive could invoke its inherent power to protect national security, the Court relied on its factual determination that the "historical documents" could not seriously breach national security.

> "[U]pon the facts adduced in this case there is no sharp clash such as might have appeared between the vital security interest of the Nation and the compelling Constitutional doctrine against prior restraint. If there be some embarrassment to the Government in security aspects as remote as the general embarrassment that flows from any security breach, we must learn to live with it. The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. In this case there has been no attempt by the Government at political suppression. There has been no attempt to stifle criticism. Yet the last analysis, it is not merely the opinion of the editorial writer, or of the columnist which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions." (Opinion, p. 15)

The Decision of the Court of Appeals

The Court of Appeals, by a 5-3 vote, remanded the case to Judge Gurfein for further *in camera* proceedings to determine on or before July 3, 1971, whether disclosure of items specified in the Special Appendix or "any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971, pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined . . ."*. Judge Kaufman, Feinberg and Oakes dissented and would have affirmed the decision below.

SUMMARY OF ARGUMENT

As of the date of argument of this appeal, the New York *Times* has been restrained by the United States for a total of 11 days from publishing articles in a series relating to the history of the Vietnam War. The order of the Court of Appeals for the Second Circuit from which this appeal is taken effectively bars further publication of such articles by the *Times* until July 3, 1971 and, with appeals in the offing, probably far beyond that date. Against the background of a First Amendment which, in the words of this Court, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

*The formulation by the Court of Appeals is, at one and the same time, circular and vague. It is difficult to divine under what circumstances Judge Gurfein is being told he may enjoin the *Times* when the test he is told to apply is whether the itemized list of the Government "poses such grave and immediate danger to the security of the United States *as to warrant their publication being enjoined.*" (Emphasis added.) As a statute, such a formulation would plainly be unconstitutional for vagueness as well as for its First Amendment connotations. We submit it is no less so because it is a judicial decree.

public, [and] that a free press is a condition of a free society", *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945) this appeal is taken.

Prior restraints on publication are peculiarly disfavored by the First Amendment. Whatever difficult conceptual issues may yet be presented with respect to the First Amendment, the bar on prior restraints is at the core of the theory of the Amendment. As such, the Government bears an extremely heavy burden to demonstrate that the prior restraint sought in this case could possibly be justified.

In *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931) this Court, in *dictum*, left open the possibility that the prohibition against prior restraints against publications might not be absolute. To the extent it is not absolute, the prohibition must at least presumptively be imposed pursuant to a legislative mandate. In this action, no legislation can be pointed to by the Government permitting the restriction sought to be perpetuated on the *Times*.

Nor, in this case, is there any inherent executive authority pursuant to which the restraint on the *Times* could be justified. Whatever the circumstances, if any, in which said authority could be found present, it would arise only when publication could be held to lead directly and almost unavoidably to a disasterous event for the country. The probabilities must be very high, near certainty, and the chain of causation between publication and the feared event must be direct. In this case, it is inconceivable the Government could meet such a test.

The process of this litigation itself has become a form of censorship. From the granting of an original temporary restraining order based on a conclusionary affidavit of an individual without personal knowledge of the facts, through a series of stays granted so as not to "moot" the issue, the *Times* has been barred from printing its stories for almost

two weeks. The procedure followed—including *in camera* hearings—has inevitably led to a deprivation of both First and Fifth Amendments rights.

ARGUMENT

I.

ANY ATTEMPT TO IMPOSE A PRIOR RESTRAINT ON PUBLICATION PLACES ON THE GOVERNMENT THE HEAVY BURDEN OF REBUTTING THE PRESUMPTION AGAINST PRIOR RESTRAINTS, WHICH IS SO WELL ESTABLISHED AS THE LAW OF THE FIRST AMENDMENT AS TO HAVE BEEN RARELY CHALLENGED IN THE HISTORY OF THE NATION.

This case lies, as is obvious, at the core of First Amendment concern, namely, the interest in "uninhibited, robust and wide-open" debate with respect to public affairs. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). This Court said just the other day, in *Rosenbloom* v. *Metromedia, Inc.,* 91 S. Ct. 1811 (1971), quoting from *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 39 U. S. L. W. at 4698.

This is as good a statement as any of the public interest the New York *Times* seeks to vindicate in this case.

The United States attempts, moreover, to impose on a newspaper the kind of prior restraint which holds an especially disfavored position under the First Amendment. It need not be contended, and we do not contend, that the

First Amendment always carries all before it, regardless of countervailing considerations. But "[a]ny claim which seeks prior restraint on publication bears a heavy burden." *Liberty Lobby, Inc.* v. *Pearson*, 390 F. 2d 489, 490 (D. C. Cir. 1968) (Burger, J.)* See also *Organization For a Better Austin* v. *Keefe*, 91 S. Ct. 1575 (1971). "[F]reedom of expression [is] the rule." *Burstyn* v. *Wilson*, 343 U. S. 495, 503 (1952). And this Court observed in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U. S. 175 (1968):

> "Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement." 393 U. S. at 180-81.

In *Near* v. *Minnesota*, 283 U. S. 697, 713-14 (1931), the Court noted that Blackstone's radical aversion to prior restraints, and the repression in Stuart England and under George I, constitute the immediate formative background of the First Amendment. The Amendment does forbid more than simply the imposition of prior restraints. In short, wrote the late Professor Chaffee, "the framers of the

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*In *Liberty Lobby*, plaintiffs sought a preliminary injunction against two syndicated newspaper columnists to prohibit "dissemination or publication" of letters and documents copied and removed from plaintiff's files. The District Court dismissed, and the Court of Appeals affirmed, per Judge (now Chief Justice) Burger, who also remarked that "a free, open society elects to take calculated risks to keep expression uninhibited." 390 F. 2d at 491.

First Amendment sought to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing seditious prosecutions."* A certain primacy has nonetheless continued to attach to the prohibition against prior restraints in the First Amendment scheme of values.

Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted, they cause irremediable loss, a loss in the immediacy, the impact of speech. They differ from the imposition of criminal liability in significant procedural respects as well, which in turn have their substantive consequences. The violator of a prior restraint may be assured of being held in contempt. The violater of a statute punishing speech criminally knows that he will go before a jury, and may be willing to take his chance, counting on a possible acquittal. A prior restraint therefore stops more speech, more effectively. A criminal statute chills. The prior restraint freezes.

It is for reasons such as these, as Mr. Justice Harlan observed in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 149 (1967), that this Court has "rejected all manner of prior restraints on publication [citing *Near* v. *Minnesota*], despite strong arguments that if the material was unprotected the time of suppression was immaterial." See also *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963).

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*CHAFEE, FREE SPEECH IN THE UNITED STATES 22 (5th Printing 1954).

II.

SUCH NARROW EXCEPTIONS TO THE RULE AGAINST PRIOR RESTRAINTS, IF ANY, AS MAY BE ADMITTED TO EXIST ARISE, FOR THE MOST PART, IN CONNECTION WITH THE REDRESS OF INDIVIDUAL OR PRIVATE WRONGS. IF THERE IS AN EXCEPTION PERMITTING IMPOSITION OF PRIOR RESTRAINTS BY GOVERNMENT ON POLITICAL SPEECH, IT IS SUBJECT TO THE FURTHER PRESUMPTION THAT IT MUST BE IMPOSED PURSUANT TO A CLEAR LEGISLATIVE MANDATE, NOT AT THE BEHEST OF THE EXECUTIVE EXERCISING SUPPOSED INHERENT POWERS.

A passage in Chief Justice Hughes' opinion in *Near* v. *Minnesota, supra,* 283 U. S. at 716 concedes that the prohibition against prior restraints need not be viewed as altogether absolute, and goes on to say that Government "might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Without entering a discussion of the hypothetical concerning obstruction of the recruiting service, which may well be considered problematic in light of later decisions*, it would seem evident that if there is any exception to the prohibition against prior restraints outside the area of private rights, its definition must run along the strict and narrowly drawn lines of Chief Justice Hughes' military hypotheticals.

The area of private rights is different, and no analogies can properly be drawn from it to a case such as the present one. No such analogies were drawn in *Near* v. *Minnesota.* The statute before him, said Chief Justice Hughes, "is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected." (283

*See *e.g., Brandenburg* v. *Ohio,* 395 U. S. 444 (1969).

U. S. at 709). Remedies for libel have, of course, not remained "unaffected" to this day, see *e.g., Rosenbloom* v. *Metromedia, Inc., supra,* but the point of the remark is that no conclusions are to be drawn for a case such as the present one, any more than they were drawn for purposes of *Near* v. *Minnesota* itself, from the possibility that one or another form of injunctive relief might be available in a suit between private parties concerning, let us say, literary property.

There can be no copyright in any publication of the United States Government or of any reprint of it, 17 U. S. C. § 8*, and it seems clear that there is no common law copyright in Government publications either. See *Banks* v. *Manchester,* 128 U. S. 244, 252 (1888); Studies on Copyright, No. 33, p. 169 (I. A. Fisher Mem. Ed. 1963). Individual claims to literary property and to privacy do not in any event themselves easily prevail or commonly achieve protection by injunction. See *e.g., Estate of Hemingway* v. *Random House, Inc.,* 23 N. Y. 2d 341, 296 N. Y. S. 2d 771 (1968); for decision denying preliminary injunction see 49 Misc. 2d 726, 268 N. Y. S. 2d 531 (Sup. Ct. N. Y. Co.), *aff'd,* 25 App. Div. 2d 719, 269 N. Y. S. 2d 366 (1st Dep't 1966). Such claims prevail all the less in the area of the public interest in discussion of political affairs. See *Liberty Lobby, Inc.* v. *Pearson, supra; Cf. Pearson* v. *Dodd,* 410 F. 2d 701 (D. C. Cir.), *cert. denied,* 395 U. S. 947 (1969).

Putting the area of private rights aside as irrelevant even for purposes of the drawing of distant analogics, we return to the narrow exception admitted by Chief Justice Hughes in *Near* v. *Minnesota.* If a prior restraint is to be

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*"No copyright shall subsist in the original text of any work which is in the public domain . . . or in any publication of the United States Government, or any reprint, in whole or in part, thereof [except in publications authorizd by Title 39 U. S. C. § 405—referring to postage stamp printings]."

imposed within that exception, we contend, it must at least presumptively be imposed pursuant to a legislative mandate. In substantiating this contention, it is important first to make clear what is not involved in this case, and what our contention is not intended to cover. Thus the question does not arise in this case, and we do not contend, that the President, as Chief Executive and Commander-in-Chief, lacks inherent authority to establish security classifications for Government documents and to set forth procedures binding on all officers and employees of the Executive Branch, and on the military services, for the handling, dissemination and disposition of classified documents. Nor is the President without means of enforcing, within the Executive Branch and in the armed services, the procedures he has laid down. He can discipline, he can discharge, and he can repossess Government property.* These enforcement powers may not be unlimited, but we may safely assume they are ample. Yet neither the power to establish security classifications, nor the power to enforce procedures relating to them within the Executive Branch and the armed services, nor again the power to repossess Government property—none of these is in question in this case.

Again, it may well be that in other circumstances, and even as it arises under Section 3 of the Administrative Procedure Act, 5 U. S. C. § 552, the question of the validity of a classification affixed to a document under Executive Order 10501, 3 C. F. R. 280 (1970) is reviewable only to the extent necessary to determine whether the classification is "clearly arbitrary and unsupportable." *Epstein* v. *Resor*, 296 F. Supp. 214, 217 (N. D. Cal. 1969), *aff'd*, 421 F. 2d 930 (9th Cir.), *cert. denied*, 398 U. S. 965 (1970). Yet in justifying this minimal measure of judicial review

*See, *e.g.*, *Dubin* v. *United States*, 289 F. 2d 651 (Ct. Cl. 1961). Nothing that the New York *Times* holds is alleged to be Government property.

even in the circumstances of the *Epstein* case (a suit by a private individual seeking to have the Government reclassify certain material), the District Court said:

> "Otherwise, the agencies could easily frustrate the purpose of full disclosure intended by Congress merely by labeling the information to fall within the exemption [to 5 U. S. C. § 552]." 296 F. Supp. at 217.

This question does not arise here, because the case does not arise under the Executive Order. This is not a case concerning the validity of a classification under Executive Order 10501, or within the meaning of 5 U. S. C. § 552. It is a suit seeking to restrain publication of certain material in a newspaper.

The question that does at least loom in the background of the present case is the question whether in extraordinary circumstances of the gravest emergency, the President may have inherent authority to act for the public safety, either by proclamation or Executive Order, or by availing himself of the process of a court of the United States. This is the question saved in *Hirabayashi* v. *United States,* 320 U. S. 81 (1943). *Hirabayashi* arose under an emergency Executive Order ratified and confirmed within a month by an act of Congress. This Court noted:

> "We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For the President's action has the support of the Act of Congress, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the joint action of Congress and

the Executive, to impose this restriction as an emergency war measure." 320 U. S. at 92.

The issue avoided in *Hirabayashi* v. *United States* is, we shall argue, not present on the facts of this case. A dire emergency comparable to the situation in *Hirabayashi* can scarcely be said to have even been alleged by the Government. Judge Gurfein in the District Court in this case found that no such emergency was even remotely present. The District Court and Court of Appeals for the District of Columbia (two judges of the latter court dissenting on the ground that the Government ought to have been allowed to offer more evidence) found that there was no such emergency on the basis of a fuller record than the Government made in the earlier hearing in New York. These findings, as we shall argue, appear to us to conclusively negative any suggestion of the existence of a major emergency comparable to the *Hirabayashi* situation. So it is only in theory, in purest theory, that the case reserved in *Hirabayashi* v. *United States* is at all relevant to the present issue.

The Government thus rests on a claim of inherent authority which on the record of this case must be interpreted as applying not only to an extreme situation of the gravest danger, which may be put aside as being *sui generis*, but in more ordinary circumstances. The question then is whether the President has a broader inherent authority, in matters generally affecting the national defense, to govern the conduct of private individuals, and in this case to impose a prior restraint on publication. Of course, the President is not acting directly on the New York *Times*, but is seeking an injunction. Yet the claim to inherent authority is present, and would form the basis for injunctive relief in this case. Courts must draw their law from somewhere, and if the source of law in this case, which is

to say the source of the authority to act, is not a statute, it must be the inherent power of the President under Article II of the Constitution.

The Government maintains that it has standing to come into its own courts to protect its functional interests under *In Re Debs,* 158 U. S. 564 (1895), and cases following it on this point. The Government does indeed have standing to come into a Federal Court to protect its functional interest in the integrity of an established rule of law, whether it is established by statute or by the Constitution. The theory of *In Re Debs, supra,* was that the conduct the Court enjoined was unlawful under the Commerce Clause of the Constitution, and perhaps under the Sherman Act. In more recent years also the Government has entered its own courts to vindicate established constitutional* and statutory** rights.

But the Government's standing to come into court to vindicate existing statutory rights is a wholly separate matter from the issue of inherent executive authority, without the aid of legislation, to formulate and establish substantive rules of law, and obtain the process of a court in order to enforce them against private individuals. This is the basic distinction between standing and justiciability taken in *Baker* v. *Carr,* 369 U. S. 186 (1962). The cases supporting the proposition that the Government can sue do not establish the proposition that the executive has inherent power to make the substantive law under which he proposes to win his suit, or that the courts do. Here we encounter a fundamental principle of the separation of

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**United States* v. *Brand Jewelers, Inc.,* 318 F. Supp. 1293 (S. D. N. Y. 1970); *United States* v. *Brittain,* 319 F. Supp. 1058 (N. D. Ala. 1970); *United States* v. *City of Jackson,* 318 F. 2d 1 (5th Cir. 1963).

***United States* v. *Republic Steel Corp.,* 362 U. S. 482 (1960); *United States* v. *Jalas,* 409 F. 2d 358 (7th Cir. 1969); *United States* v. *Arlington County,* 326 F. 2d 929 (4th Cir. 1964).

powers, which teaches that there is no such inherent executive authority. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952); *Kent* v. *Dulles,* 357 U. S. 116 (1958); *United States* v. *United States District Court,* 39 U.S.L.W. 2574 (6th Cir. April 8, 1971), *cert. granted,* 39 U.S.L.W. 3556 (June 11, 1971) (No. 1687); *United States* v. *Hilliard,* 39 U.S.L.W. 2679 (C. D. Cal. May 4, 1971). *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* the great steel seizure case of 1952, surely came up under circumstances of a very substantially grave emergency, and *Kent* v. *Dulles, supra,* dealt with a subject matter rather near to ours, namely foreign affairs.

III.

ON THE FACTS OF THIS CASE, THE GOVERNMENT CANNOT PREVAIL WITHOUT A STATUTORY BASIS. NONE EXISTS.

Since we have concluded that the Government's generalized claim to inherent Presidential authority as the source of an injunction in this case cannot stand, we maintain that on the facts, as found by Judge Gurfein in the District Court in our case, and on a fuller record by two courts in the Washington *Post* case, the Government's complaint must be dismissed without further inquiry, unless some statutory basis can be found for it. Our contention would be that no statute could constitutionally result in the issuance of an injunction in this case, but without conceding that point, the argument in this section is that no statutory basis for the action exists.

We have surveyed all statutory provisions which might, by their terms, prohibit the dissemination (to use the broadest term) of sensitive government information. The

only statutory provision which is not, on its face, conclusively inapplicable in this case is 18 U. S. C. § 793(e).*

Although it briefly attempted to rest on 18 U. S. C. § 793(d), the Government, having abandoned that false reliance, has cited us to no statute other than 18 U. S. C. § 793(e). There is a faint contention that the Freedom of Information Act, 5 U. S. C. § 552, has some relevance to

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*Congress has enacted other statutory provisions to prohibit and punish the dissemination of information, the disclosure of which it thought sufficiently imperilled national security to warrant that result. These include 42 U. S. C. §§ 2161 through 2166 relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U. S. C. § 2162 authorizes the Atomic Energy Commission to classify certain information. 42 U. S. C. § 2274, subsection (a) provides penalties for a person who "communicates, transmits, or discloses . . . with intent to injure the United States or with intent to secure an advantage to any foreign nation." Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation. . . ." Other sections of Title 42 of the U. S. C. dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. 42 U. S. C. §§ 2276, 2277. Title 50 U. S. C. Appendix § 781 (part of the National Defense Act of 1941, as amended, 55 Stat. 236) prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation, as specified; and indeed Congress in the National Defense Act conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U. S. C. App. § 1152. 50 U. S. C. § 783(b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person whom that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any communist organization.

the case in that it offered a way to the New York *Times* to seek the declassification of the documents in question in this case, and then to acquire access to them. This contention must rest on the theory that the Freedom of Information Act was intended to provide—for the press as well as for private individuals—an exclusive avenue toward obtaining government information. Such a theory is palpably erroneous. Nothing is clearer about the Freedom of Information Act than that it was meant to open further avenues to obtaining information from the government, not to foreclose any existing ones. If, therefore, the New York *Times* was entitled under the Constitution and laws to publish the documents published in this case, obtained as they were, then the other, slower and more laborious route perhaps opened up by the Freedom of Information Act is irrelevant. If, on the other hand, consistently with the Constitution of the United States, it was unlawful for the New York *Times* to obtain and publish the documents in question in this case, then the Freedom of Information Act is equally irrelevant; it could not have helped.

18 U. S. C. § 793(e), the only statute whose possible application in this case so much as needs to be discussed, must be approached, of course, in light of the special requirements of clarity and precision which obtain when First Amendment rights are in play. *United States* v. *Rumely*, 345 U. S. 41 (1953); *Watkins* v. *United States*, 354 U. S. 178 (1957); *Kent* v. *Dulles*, 357 U. S. 116 (1958); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Gojack* v. *United States*, 384 U. S. 702 (1966). "The tradition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law." *Masses Publishing Co.* v. *Patten*,

244 Fed. 535, 543 (S. D. N. Y.) (L. Hand, J.), *rev'd on other grounds*, 246 Fed. 24 (2d Cir. 1917).*

18 U. S. C. § 793(e) reads as follows:

> "(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;"

Judge Gurfein in dismissing the Government's prayer in the District Court in this case, held 18 U. S. C. § 793(e) inapplicable. He relied, in part, on the notable absence of the word "publish." "A careful reading of the section," wrote Judge Gurfein, "would indicate that this is truly an espionage section where what is prohibited is the secret or

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*18 U. S. C. § 793(e), moreover, is a criminal statute. Its construction in this extraordinary civil action can hardly be different from the construction which would be given it if it were used to achieve its prime end, namely, imposition of the criminal sanction. Criminal statutes also receive close and narrow readings. *United States* v. *Sullivan*, 332 U. S. 689 (1948); *Winters* v. *New York*, 333 U. S. 507 (1948); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926).

clandestine communication to a person not entitled to receive it. . . ."

Naturally enough, we have not found, and the Government has not cited, any case beyond a single civil action* —not a prosecution or in any way an action initiated by the Government—in which § 793 or its companion sections of the Espionage Act have been applied to anything but an ordinary espionage situation.**

The scheme of the Espionage Act as a whole and its legislative history both confirm Judge Gurfein's determination that publishing was not meant to be covered by Section 793(e).*** The striking fact is, as Judge Gurfein pointed

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*_Dubin_ v. _United States_, 289 F. 2d 651 (Ct. Cl. 1961) (a civil action brought by a private citizen to recover the fair market value of radar equipment purchased as "surplus" which the Government reclaimed under an assertion that said devices were "classified" and mistakenly sold for surplus).

**See _Gorin_ v. _United States_, 312 U. S. 19 (1941); _Boeckenhaupt_ v. _U. S._, 392 F. 2d 24 (4th Cir. 1967), _cert. denied_, 393 U. S. 896 (1968); _U. S._ v. _Rosenberg_, 195 F. 2d 583 (2d Cir.), _cert. denied_, 344 U. S. 838 (1952) (Stay by Douglas, J. vacated, 346 U. S. 273 (1953)); _U. S._ v. _Drummond_, _supra_, and _U. S._ v. _Butenko_, 384 F. 2d 554 (3d Cir. 1967), vacated _sub. nom. Alderman_ v. _U. S._, 394 U. S. 165 (1969).

***This is not to say that, as 18 U. S. C. § 1717 assumes, it is not possible for a newspaper to violate other subsections of Section 793 in the same fashion as an individual or an entity of any sort is capable of violating Section 793. Thus presumably if a newspaper violates subsection (b) of Section 793 by taking or copying, a photograph or a map, or an appliance, or indeed a document connected with the national defense, for the purpose of obtaining information about it and with intent or reason to believe that the information is to be used to the injury of the United States, it can then become a publication under 18 U. S. C. § 1717 which is in violation of Section 793, and is therefore nonmailable. Or a newspaper could with similar effect violate subsection (c) of Section 793. But the consequences would only be that it becomes nonmailable. 18 U. S. C. § 1717 is drawn from Title 12 of the original Espionage Act of 1917. As we shall see, _infra_, Congress at that time explicitly rejected a proposal for censorship of newspapers on the ground that it would be unconstitutional. Congress at the time believed, however, that it could consistently with the First Amendment exclude newspapers from the mails, and that was what Congress did. Section 1717 and its legislative history further confirm the inapplicability of 18 U. S. C. § 793(e) as a source of authority to censor.

out, that when Congress wanted to proscribe the act of publishing as well as communicating, delivering or transmitting, it knew how to do so and insisted on dong it with precision. Thus, when Congress dealt in Section 794 with the highly dangerous act of revealing to the enemy, in wartime, information on troop movements and dispositions, on ships, aircraft and war materials, on operations, plans, fortifications and other [which would be construed to mean similar] information relating to public defense, Congress spoke of whoever, in time of war, "collects, records, *publishes,* or communicates." (Italics supplied) Again, when in Section 797 Congress dealt with special military and naval installations so dominated by the President, Congress spoke of "whoever reproduces, *publishes,* sells, or gives away any photograph, sketch, picture," etc. (Italics supplied) Finally, when in Section 798 Congress defined and listed, and then punished the disclosure of, four categories of classified information, having to do with codes and cryptography, it spoke of whoever "knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or *publishes* . . . ." (Italics supplied)*

In the scheme of the Espionage Act, the terms communicating; furnishing, making available, transmitting and, on the rare occasions when it appears, publishng, are used with care. When Congress wished to cover the latter, it named it. And under a Constitution that includes a First Amendment, which in turn places the act of publishing to the people in a specially protected category, it is natural for a legislative body to make nice distinctions between words

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*As Judge Gurfein stated:

"The government does not contend, nor do the facts indicate, that the publication of the documents in question would disclose the type of classified information specifically prohibited by the Congress [in 18 U. S. C. § 798]."

(*e.g.* communicate, transmit) aptly characterizing the ordinary espionage transaction, and the term which describes the activities of those who issue to the public its daily newspapers, its books, and, by extension, its radio and TV broadcasts. And it is doubly natural, given the First Amendment, for Congress to have used the word "publish" sparingly, and only when it thought it crucial. All this the legislative history noted by Judge Gurfein amply demonstrates.

In the extended debates in the first session of the 65th Congress in 1917 on the predecessor espionage act to present Sections 793 and 794 of Title 18 U. S. C., both the House Bill (H. R. 291), which ultimately was enacted as Sections 31, 32, 34 and 36 of Title 50 U. S. C.,* and the parallel (but more broadly drawn) Senate Bill (S. 2), contained provisions empowering the President in time of war or threat of war to directly prohibit by proclamation the publication of information relating to national defense which might be useful to the enemy. The provision in H. R. 291 was as follows:

> "SEC. 4. During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: *Provided,* That nothing in this section shall be construed to limit or restrict any discussion, comment,

*Act of June 15, 1917, ch. 30, Title I §§ 1, 2, 4, 6, 40 Stat. 217, 218, 219.

or criticism of the acts or policies of the Government or its representatives or the publication of the same." 55 Cong. Rec. 1763 (1917).

Since war had already been declared on Germany, Congress was under great pressure to grant whatever emergency powers the executive requested. Yet Congress resisted the censorship proposal. Senator Ashurst of Arizona, among others, spoke at length, and with present relevance, on the question of censorship, even if his more general First Amendment views have a somewhat quaint sound to our ears:

> "Mr. ASHURST. Mr. President, I have submitted an amendment to Chapter II of the pending bill because I am unable to support that chapter in its present form. I am opposed to a censorship of the press as we have come to know that expression, and I oppose it on two grounds—upon the ground of public policy and upon the ground of constitutionality. I shall discuss the present chapter, reviewing both aspects of the same as they present themselves to me; that is, from the standpoint of public policy and from the standpoint of its constitutionality . . . .
>
> "What does 'freedom of the press' mean? It is amazing to note the amount of loose talk—not in the Senate, but throughout the country and in the newspapers themselves—as to what is 'freedom of the press' as used in the Constitution of the United States. The average citizen of this Republic, the ordinary publisher in our country who is not a lawyer, thinks that 'freedom of the press' means the right to publish his sentiments just as he pleases. In a large sense, that may be true; but in a legalistic

> sense, and from a constitutional standpoint, that is not entirely accurate. 'Freedom of the press' means simply, solely, and only the right to be free from a precensorship, the right to be free from the restraints of a censor. In other words, under the Constitution as amended by amendment No. 1, 'freedom of the press' means nothing except that the citizen is guaranteed that he may publish whatever he sees fit and not be subjected to pains and penalties because he did not consult the censor before doing so. The citizen is left to publish just what he pleases, and must take his chances before a court of his country as to whether or not he has published anything libelous or anything that may bring any human being to disrepute or ridicule, or whether he has published anything of a treasonable or obscene nature. I undertake to say upon the floor of the Senate that any sort of censorship which even the necessities of war may apparently cast upon us would not be in keeping with the Constitution of the United States." 55 Cong. Rec. 2004 (1917).

On May 4, 1917, Section 4 of Title I of H. R. 291, quoted above, was stricken in the House. *Id.* at 1808. The bill passed without it.

By the Act of May 16, 1918, Congress amended the Espionage Act of 1917 so as to punish (but not restrain) seditious speech. This was the amendment under which *Abrams* v. *United States,* 250 U. S. 616 (1919), of unhappy memory, was in part decided. See also *Pierce* v. *United States,* 252 U. S. 239 (1920); *Schaefer* v. *United States,* 251 U. S. 466 (1920). In 1921, the 1918 amendment was rather resoundingly repealed. 41 Stat. 1359 (1921).

When, in 1953, it enacted the second of the two sections numbered 798 in Title 18, continuing in effect the wartime penalties of Section 794, Congress had before it a report from a Senate committee which analyzed some of the sections we are concerned with. The committee pointed out that the prohibition of Section 794 on gathering or publishing certain information with intent to communicate it to the enemy could be invoked only in time of war. However, the committee pointed out that Section 793 of Title 18 prohibits *"similar acts of gathering or communicating* defense information at any time (in wartime or peacetime), under penalty of a fine . . . or imprisonment . . . or both." S. Rep. No. 409, 83d Cong., 1st Sess. 2-3 (1953). (Italics supplied) The committee thus carefully noted and brought to the attention of Congress the differences between the two sections, and the omission in Section 793 of the act of publishing, although "similar acts of gathering or communicating" were covered. The committee did not suggest that Congress supply this omission, and Congress did not. But nothing could be clearer than that Congress was aware of it, and of its significance. What the committee did suggest, and what Congress did do, was to continue in effect the wartime penalties of Section 794—which does punish publishing.

The omission of the word "publish" in Section 793, and the fact, therefore, that newspapers were not covered by it, continued to be noticed in Congress. In 1957, the Senate had before it S. 2417, introduced on June 27, 1957, by Senator Cotton (for himself and Senator Stennis), expressly to implement certain of the recommendations of the Commission on Government Security for revision, *inter alia,* of the espionage laws. (85th Cong., 1st Sess., 103 Cong. Rec. 10447) The Commission specifically focused on the problem of unauthorized publication of classified information as being not covered by the Espionage Act:

"The Commission found to its dismay that one frustrating aspect of this overall security problem is the frequent unauthorized disclosure without subversive intent of classified information affecting national security. Several instances were noted where information emanating from the Department of Defense, and subsequently determined to have been classified, has found its way through various media into the public domain, when in deference to the interests of national security more restraint should have been exercised before dissemination. Airplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons.

"In many instances the chief culprits responsible for any unauthorized publication of classified material are persons quite removed from Government service and therefore not amenable to applicable criminal statutes or other civil penalties. Congressional inaction in this particualr area can be traced to the genuine fear of imposing undue censorship upon the bulk of information flowing from the various governmental agencies, and which the American people, for the most part, have the right to know. Any statute designed to correct this difficulty must necessarily minimize constitutional objections by maintaining the proper balance between the guarantee of the first amendment, on one hand, and required measures to establish a needed safeguard against any real danger to our national security." (Report of the United States Commission on Government Security 619-20 (1957))

That the Commission's Bill, S. 2418, was intended to extend the applicability of Section 793 to newsmen among others was well-understood. (See 103 Cong. Rec. 10449 (1957).) The bill was, of course, not acted upon, but it demonstrates yet again that until the present action against The New York Times, no one supposed that Congress, despite the First Amendment, and in the teeth of common English usage, had meant to cover the act of publishing by using such words as "communicate, deliver or transmit." The omission of the word "publish" in § 793 was noted.

Judge Gurfein also held that under *Gorin* v. *United States*, 312 U. S. 19 (1941), § 793(e) could be constitutionally applied, if at all, only upon a finding that a violation of it, in addition to being willful, was committed with knowledge that the information involved "could be used to the injury of the United States or to the advantage of any foreign nation."* Otherwise, the operative phrase of the statute "relating to the national defense," would be unconstitutionally vague. It may be that in the present § 793(e), as compared to the slightly different predecessor section involved in *Gorin, supra,* the clause "reason to believe [that it] could be used etc. . ." modifies only the word "information," not the words "any document, writing, code book . . ." *Scienter* could not then be imputed as an element in the phrase "relating to the national defense" so far as it relates to documents and writings which under the Government's allegations are in issue in this case. Under either construction, the statute is inapplicable. Without *scienter, Gorin* v. *United States* indicates that it is too vague to be applied.

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*The United States Attorney observed that it was the Government's "assumption that the *Times* acted in complete good faith. . . ." (Tr. 36) That being so, there could be no violation of 18 U. S. C. § 793(e).

If, on the other hand, *scienter* is held to be required, then, as Judge Gurfein held, the Government must fail because it is impossible to find on this record that the New York *Times* had "reason to believe" that the documents "could be used to the injury of the United States or to the advantage of any foreign nation." As our uncontroverted affidavits show, the New York *Times* believed—as Judge Gurfein was later to hold—that it was dealing with historical materials running back several years, all at least three, and some many decades. A reason to surmise injury to the United States or advantage to a foreign nation could be imputed to the New York *Times* on the facts of this record only by accepting the preposterous and plainly unconstitutional construction that any discomfiture caused the Government of the United States by political opposition at home qualifies as an injury to the United States and an advantage to a foreign nation within the meaning of § 793(e).

Quite aside from any requirement of *scienter*, and all the more so if such a requirement is applicable, the concept of documents or information "relating to the national defense" must be restricted to a meaning that can fairly be expected to have been in the minds of, or at least accessible to, persons situated as was the New York *Times* in this case. We believe the concept is unconstitutionally vague if it is read to go beyond both decided cases that have construed it in the past, and the common understanding exhibited in the practices of newspapers and publishers of other materials.

At no time until the Government's motion was filed in the District Court on June 15 has the Government used this section to move criminally or civilly against the publication—not communication or transmittal or delivery, but *publication*—of any materials or information in a newspaper or magazine or book or any other medium addressed

internally within the United States to the American public. This has been the unbroken administrative practice, which we submit is conclusive against the attempted application of Section 793 in this case. *Cf., Poe* v. *Ullman*, 367 U. S. 497 (1961)

There might be some question about the significance of the previously unbroken administrative practice if it were true that no or few recent occasions had arisen, or come to the Government's attention, which presented the need for an application of the statute (if such an application were thought possible), beyond the ordinary espionage situation. But the overwhelming fact, demonstrated by our uncontradicted affidavits (*e.g.*, Frankel affidavit ¶¶ 15, 16, 20)* is that numerous publications similar and even precisely equivalent to the publications made and still contemplated by The New York *Times* have been common in newspapers, magazines and books in the United States for many years.

The unbroken practice on the part of the Government of moving only against what may properly be defined as espionage has prevailed, then, in a context of public discourse in which the supposed offense now charged to the New York *Times* under Section 793(e) was common occurrence in newspapers, magazines and books published to the American people.** This is the context of public discourse in which memoirists who formerly held high government office

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* See also affidavit of Walter Rugaber, ¶ 2 and annexed exhibits; affidavit of Hedrick Smith, ¶ 2 and annexed exhibits; affidavit of John W. Finney, ¶ 2 and annexed exhibits; affidavit of Tad Szulc, ¶ 2 and annexed exhibits; and affidavit of William Beecher, ¶ 2 and annexed exhibits.

** One-time newspaper (but not book) publications are difficult to move against by seeking an injunction. But ours is not the first relevant serial publication. See, for example, the series by David Kraslow and Stuart Loory of the Los Angeles *Times* entitled "The Secret Search For Peace in Vietnam," to this day the most extensive newspaper (and book) account of the diplomacy surrounding the War.

and various journalists and others have published books going over the same ground as the publications of the New York *Times*, and using in part materials included in the documents now in the possesssion of the New York *Times*.*

It may be contended that Attorney General Mitchell's telegram to the New York *Times* of June 14th authoritatively defines the phrase "relating to the national defense" for purposes of this case, and cures its vagueness. Among other difficulties with this contention, the decisive one is that it would repose untrammeled discretion in the Attorney General or in the Secretary of Defense or in some other officers of the Government to define the terms of a statute which imposes criminal penalties, and which in this unprecedented instance is being used to impose a prior restraint upon a newspaper. Such a delegation would without doubt be unconstitutional under *Kent* v. *Dulles, supra; United States* v. *Rumely, supra; Watkins* v. *United States*, 354 U. S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957). See also *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935).

There is no warrant for defining the concept, "relating to the national defense," as coterminous with the concept of classified information. Nor would it be possible in this fashion to cure the vagueness of the phrase as applied in this case, since no expectation can be imputed to the defendant that any classified material, no matter what its

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*See Frankel affidavit ¶¶ 27, 28; see, also MATTHEW B. RIDGEWAY, THE KOREAN WAR, pp. 267, 268 (containing texts of letter of instruction to air and naval forces of the United States; THEODORE C. SORENSON, KENNEDY, p. 612 (relating to the "missile gap"), p. 642 (relating to U. S. intervention in Laos), p. 659 (paraphrasing cable relating to overthrow of Diem), p. 712 (relating to Cuban missile crisis); JOHN BARTLOW MARTIN, OVERTAKEN BY EVENTS, p. 757 (revealing the author's sources of information to be private notes and files accumulated while in government service), p. 235 (paraphrasing a "top priority—top secret" cable on communist involvement in Dominican Republic in 1965).

nature, would be considered to relate to the national defense within the meaning of this statute. It is notorious that numerous papers having no proper relation to the national defense, or no longer having any, and in no sense dangerous or injurious to the national security if published, are or remain nevertheless classified, despite the perhaps more restrictive criteria for classification contained in Executive Order No. 10501 3 C. F. R. 280 (1970). The late Professor Chafee wrote:

> "Of course, state secrets are nothing new. Military information was always guarded from the enemy, and bureaucrats have often invoked public safety as a protection from criticism. What is significant is the enormous recent expansion of the subjects which officials are seeking to hide from publication until they give the signal. If persuasion fails to prevent leaks, they are tempted to use threats. The result may be a hush-hush attitude, likely to extend beyond the real public need for silence. . . . A direct consequence of secrecy in the ordinary press may be great activity of the subsidiary press in disseminating the concealed material, and this is more dangerous than frank discussion in the general press. . . . Too often we get as gossip what ought to reach us as regular news." CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, 13-14 (Archon ed. 1965).

It may be true, and it does not in any event affect our position in this case, that as was held in *Epstein* v. *Resor*, 296 F. Supp. 214 (N. D. Cal.), *aff'd*, 421 F. 2d 930 (9th Cir. 1969), *cert. denied*, 398 U. S. 965 (1970), no elaborate inquiry into the justification for a classification will be undertaken by a court in response to a suit by a private individual seeking to have the Government declassify mate-

rial so that the plaintiff can obtain it under Section 3 of the Administrative Procedure Act, 5 U. S. C. § 552. That statute by its terms does not apply to materials kept secret in the interest of national defense or foreign policy. The scope of review of the *Epstein* case may, perhaps, be acceptable when the classification comes under attack in a suit by a plaintiff wanting to obtain material from the Government—that is one thing. But there is a vast difference when application to a private person of a criminal statute is attempted, or when as here the Government seeks to impose a prior restraint on publication. Under these conditions, the judicial function in passing on criteria for classification is infinitely more crucial. Yet, of course, even in the *Epstein* case, as we have noted, the Court did not accept without question and without judicial review any classification simply because it was placed on a document in the regular order by a government official. The Court undertook rather to make an independent judicial inquiry at least whether a classification is "clearly arbitrary and unsupportable."

Other cases in addition to *Epstein* conclusively refute any assertion that the question of whether a classification is valid is a political question, and that the act of classification is an exercise of executive discretion not subject to judicial review. To the contrary, as it affects private rights, the act of classifying a document, like other even more serious exercises of executive discretion relating to the internal and external security of the country, is subject to judicial review, even as the ultimate act of declaring martial law is, under our system of government, subject to judicial review.* *Sterling* v. *Constantin*, 287 U. S. 378 (1932);

*A somewhat analogous situation is the assertion by the Government of a privilege not to disclose classified information demanded by a party in a suit to which the Government is also a party. This privilege was honored in narrowly defined circumstances in *United States* v. *Reynolds*, 345 U. S. 1 (1953), partly on the ground that

Duncan v. *Kahanamoku*, 327 U. S. 304, 336, (1946), (Stone, C. J., concurring). In *United States* v. *Drummond*, 354 F. 2d 132 (2d Cir. 1965), *cert. denied*, 384 U. S. 1013 (1966), which affirmed a conviction under the Federal Espionage Act, the court held that the classification of certain documents as "Top Secret" or as "containing information affecting the national security of the United States" was not sufficient for a conviction. Rather, the Second Circuit ruled that the defendant had a "right to a jury determination on the character of the documents," pointing out that the trial court had properly charged the jury that:

> "Whether any given document relates to the national defense of the United States is a question of fact for you to decide. It is not a question of how they were marked." *Id.* at 152

The Government cannot rest, in this action, on any statutory authority.

IV.

EVEN IF AN EXCEPTION TO THE PROHIBITION AGAINST PRIOR RESTRAINTS WERE APPLIED IN THIS CASE, THE REMAND REMAINS IMPROPER BECAUSE THE NATURE OF ANY SUCH EXCEPTION IS SUCH THAT IT COULD NOT FIT THE RECORD IN THIS CASE.

The most evident characteristic of military examples ("sailing dates of transports or the number and location of troops") given by Chief Justice Hughes in *Near* v. *Min-*

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no unavoidable necessity was shown for the privileged information. But the court noted that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U. S. at 9-10. *Cf.*, Proposed Rule of Evidence for the United States Courts and Magistrates Rule 509 "Military and State Secrets," subparagraph (e) 91 S. Ct. 61-64 (April 15, 1971). The Government "informer privilege" is also carefully circumscribed. See *Roviaro* v. *United States*, 353 U. S. 53 (1957).

nesota, supra, and the plain connotations of the phrase, "grave and immediate danger to the security of the United States," used by the Court of Appeals for the Second Circuit in remanding this case to the District Court, indicate if even an exception to the prohibition against prior restraints were to be judicially established, it would arise only when publication could be held to lead directly and almost unavoidably to a disastrous event. The probabilities must be very high, near to certainty, and the chain of causation between the publication and the feared event must be direct. Anything less will risk having the exception swallow up the rule.

We would contend that the test must be more rigorous than that employed in *Dennis* v. *United States,* 341 U. S. 494 (1951)* because of the especially disfavored position of prior restraints in First Amendment doctrine as opposed to regulation by subsequent criminal sanction. Procedural safeguards, including the proof of intent in the *Dennis* case, do not apply where prior restraints are in question. But even if, purely for the sake of argument, we accepted the *Dennis* test, we would still need what is surely essential, namely a direct nexus, supplied by proof of intent or otherwise, between the publication and the feared event supposedly likely to flow from it. We will argue that in the circumstances of this case the Government has in no single instance been able to show any direct nexus, any probable and immediate chain of causation, between the many documents it wishes to suppress and supposed events that might follow upon their publication, and we think that under the *Dennis* test the Government's suit must fail. But for the reasons mentioned we do not accept the *Dennis* test in a

*"In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." 341 U. S. at 510.

prior restraint case, and return rather to the evident intent of Chief Justice Hughes in the opinion of *Near* v. *Minnesota, supra,* and to the connotations of the Second Circuit's formulation.

The Government is not entitled by prior restraint to avert just any significant evil, discounting its probability by its gravity. Certainly it may not do so without a statutory warrant. If there is an exception to the prohibition against a prior restraint that needs no statute to invoke it, it can exist only in circumstances where a publication will directly and immediately cause, by a probability amounting to a certainty, a grave and disastrous breach in the security of the country.

If we characterize the applicable test correctly, and indeed even if something of the more attenuated test of *Dennis* is read in to modify the test we propose, the exception to the prohibition against prior restraints could not be invoked in the circumstances of this case. For one would suppose that the document or documents which might fall within this extraordinary exception would certainly have leaped to the memory or to the eye of the Government officials who for one or another purpose, and since June 13 for purposes of this case, have been reviewing the volumes of which the New York *Times,* and now also the Washington *Post* among other papers, possess copies.

Mr. Dennis James Doolin, a Deputy Assistant Secretary of Defense, had the documents in his office for approximately six months reviewing them in response to a request from Senator Fulbright for a copy (Tr. 130-31). He then reviewed them again (Tr. 124). Yet on the basis of his testimony in open court and *in camera,* District Judge Gurfein (and later Judge Gesell, before whom Mr. Doolin also testified) held that no document of a sufficiently serious nature to justify imposition of a prior restraint had been

pointed out to him, and this finding was left undisturbed by the Court of Appeals for the Second Circuit *en banc*. Nor, of course, did other Government witnesses succeed in convincing Judge Gurfein or the Court of Appeals for the Second Circuit of the danger in the publication of any given document. By the time testimony was taken before Judge Gurfein on Friday, June 18, three days had passed since the Government commenced this action, and five days since the New York *Times* began publication of the series. It seems to us conclusive against the supposition that a document to which the exception could be applicable is involved in this case, that a reference to it did not surface in Mr. Doolin's mind almost instantly, or at least in response to Judge Gurfein's repeated requests for specificity and particularity.

In the Washington *Post* case, consolidated with this one for purposes of argument, the record made by the Government was ampler. It included, in affidavit form, the very material, or at least closely similar material, to that which the Government came forward with in this case only at the time it reached the Court of Appeals, and which, over our objection, it was allowed to bring to the attention of the Court in the form of a "Special Appendix." This is the material as to which the Court of Appeals would require Judge Gurfein to hold further hearings. District Judge Gesell and the Court of Appeals for the District of Columbia in the Washington *Post* case passed on this or closely similar material. Both of these courts found nothing sufficiently dangerous to the national security to justify issuance of an injunction. Error is, of course, possible. Error may even amount to such abuse of discretion as will result in the reversal by an appellate court of the denial of a preliminary injunction. But we submit that it must be in the nature of any exception to the prohibition against prior restraints that a document to which it can be applied, a document that

can be a direct cause of a grave breach in the national security, would be recognizable almost instantly by any court which had been given the appropriate guidance by the Government. Our submission, in short, is that Judge Gurfein, on the record made before him, and the Court of Appeals for the Second Circuit on that same record, and Judge Gesell on the record made before him, and the Court of Appeals for the District of Columbia on that same record—all these judges could not have been that wrong.

It seems clear to us that the reason why the Government has been unable to convince any court of the existence in this case of a document that would fit an exception to the prohibition against prior restraints is that the formulation of such an exception that the Government has in mind differs from that indicated by the Court of Appeals of the Second Circuit, and certainly differs markedly from that indicated by Chief Justice Hughes in *Near* v. *Minnesota*, *supra*. The difference lies not only in the gravity of the danger that the Government believes it must show, but in the directness and immediacy of the chain of causation that is required between the publication and the feared danger. This will be made unmistakably evident by an examination of the standards of judgment voiced by Government witnesses who appeared in the hearing before Judge Gurfein. In general remarks and in pointing to the few specific examples which they cited to Judge Gurfein, these witnesses showed that their conception of the dangers justifying imposition of a prior restraint included diplomatic embarrassments, the possibility of internal political difficulties caused to friendly governments, the addition of a causative effect, however minor, to chains of events which are well launched and sufficiently caused by other facts, or the confirmation of knowledge about methods of operation which is either already in the public domain or presumed to be

otherwise available to foreign governments. What is perhaps even more important, Government witnesses in each relevant instance reasoned from publication to feared effect not directly and immediately, but along a lengthy chain of causation whose links invariably included speculation and surmise. On such data, prior restraints on the press cannot conceivably be sustained.

V.

THE DEFINITION OF ANY EXCEPTION TO THE RULE AGAINST PRIOR RESTRAINTS MUST BE SUCH AS TO ENABLE COURTS TO PERCEIVE ITS APPLICATION EXPEDITIOUSLY, ELSE THE PROCESS OF LITIGATION BECOMES A FORM OF CENSORSHIP.

The history of this case demonstrates that unless an exception, if any, to the rule against prior restraints is defined along the lines we suggested in the previous section, so that the rare occasion for applying the exception will fairly leap to the eye, a form of prior restraint is made available to the Government in the process of litigation, even though the Government may ultimately fail. This kind of prior restraint by litigation itself inflicts unacceptable injury to First Amendment rights.

The Government sought a prior restraint on June 15. Its allegations of irreparable injury to the national interest were general, conclusory, and aside from predicting "irreparable harm" silent on the question of the gravity of the harm. In resisting the request for a temporary restraining order, we were met—as also at every subsequent stage of the litigation when resisting extensions of the restraining order—with the argument that to allow us to publish would be to moot the Government's case, and to foreclose the possibility of an appellate decision that might yet find substance in it.

It will be true in every case that a failure to impose a prior restraint will moot the case of the party seeking it. And it will always be true that if the prior restraint, however temporary, were not imposed, the party seeking it would suffer irreparable injury, namely publication of what he wanted restrained. It is a kind of irreparable injury by hypothesis. It will equally always also be true that the party to be restrained suffers no irreparable injury, in the sense that he can publish or exhibit when the restraint is lifted.

The irreparable injury to the party to be restrained must also be injury by hypothesis—the hypothesis of the value of speech, the benefits gained from its immediacy and free flow, which is embodied in the First Amendment. Thus, in prescribing, in *Freedman* v. *Maryland*, 380 U. S. 51 (1965), a constitutionally acceptable procedure for restraining allegedly obscene matter, the Court said that such a procedure must "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" restraint. (380 U. S. at 59) A model, said the Court, was to be found in the procedure upheld in *Kingsley Books Inc.* v. *Brown*, 354 U. S. 436 (1957). The New York statute approved in *Kingsley Books* requires a hearing on the issue of obscenity within one day after joinder of issue, and a judicial decision within two days after termination of the hearing. The *Times* has been under restraint for the eleventh day on the date of this expedited argument.

Under the order of the Court of Appeals for the Second Circuit, of which we are now seeking review, the *Times* would remain under restraint until July 3rd, unless the District Judge was somehow able to find his way through dozens upon dozens of items the Government has generated since the first hearing that was had before him. After July 3rd, one would suppose that further appellate procedures would follow while the restraint was continued.

No doubt, the volume of documents involved in this case is exceptional. But the expedited procedures that have brought us to this Court in ten days are also not likely to be the normal fate of every such case, particularly a case brought against a more obscure publication, commanding lesser resources. We submit that procedural delays running to many days and possibly weeks would necessarily inhere in a definition of an exception to the rule against prior restraints which was less strict than the one we have suggested, and which could have application to less than obvious cases.

We maintain that the procedure, adopted over our objection, allowing the Government to enlarge the factual record it had made before Judge Gurfein with an appendix submitted to the Court of Appeals, and to then go back on remand to the trial judge with leave to enlarge the record further—such a procedure, we submit, in itself constitutes a prior restraint in violation of the First Amendment. But we submit further that no procedure likely to consume less than several days, and often perhaps more, is foreseeable unless any exception to the rule against prior restraint is closely defined, so as to apply only to obvious cases. Absent such a strict and narrow definition, prior restraints by judicial process will be an inevitable occurrence, and will run well past the time limit laid down in *Freedman v. Maryland, supra*. They may be temporary restraints, as viewed in fields where immediacy is less significant than is true with the press, but it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech. Only in the most extraordinary, gravest and most obvious circumstances can we permit ourselves to do so, for the reason, among others, that only in such circumstances can we expect the restraint resulting from procedure itself to be brief.

VI.

THE COURT OF APPEALS IMPROPERLY REMANDED THE ACTION TO THE DISTRICT COURT.

We turn, in conclusion, to the standard of review which should have been applied to the proceedings before Judge Gurfein by the Court of Appeals.

The relief sought by the United States in this action is injunctive in nature. A preliminary injunction is "an extra-ordinary remedy, and will not be granted except upon a clear showing of probable success *and* possible irreparable injury." *Checker Motors Corporation* v. *Chrysler Corporation*, 405 F. 2d 319 (2d Cir.), *cert. denied*, 394 U. S. 999 (1969). Entirely apart from the overriding First Amendment issues present in the case, the United States must—if it is to be entitled to any chance of success—meet stern tests for the granting of such relief.

Since the legal tests applicable to the obtaining of a preliminary injunction are demanding ones, the courts have naturally indicated that a party appealing from the denial of preliminary injunction must meet still more demanding tests. As expressed in a great variety of cases, in order for an appellate court to reverse the denial of temporary injunctive relief "[a] clear abuse of discretion . . . must be shown. . . ." *Checker Motors Corporation, supra* at 323; *Packard Instrument Co.* v. *Ans, Inc.*, 416 F. 2d 943 (2d Cir. 1969); *Dino deLaurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373, 374-75 (2d Cir. 1966). The findings of a trial court with respect to a motion for a preliminary injunction may not be set aside "unless clearly erroneous." Fed. R. Civ. P., Rule 52 (a); 5 J. MOORE FED. PRACTICE ¶ 52.07 at 2732 (2d ed. 1970). See, *e.g.*, *Unicorn Management Corp.* v. *Koppers Co.*, 366 F. 2d 199, 203 (2d Cir. 1966) ("On the basis of the findings of fact made by the district court, which we must

accept unless clearly erroneous . . . it was not an abuse of discretion to issue a preliminary injunction in this case."); *Craggett* v. *Board of Education*, 338 F. 2d 941 (6th Cir., 1964) (rule applied to findings of fact supporting denial of preliminary injunction); *Progress Development Corp.* v. *Mitchell*, 286 F. 2d 222, 229 (7th Cir. 1961) (denial of temporary injunction); *Gibson Wine Co.* v. *Snyder*, 194 F. 2d 329 (D. C. Cir. 1952).

That the United States did not demonstrate any abuse of discretion by Judge Gurfein in his determination that the United States had not demonstrated "probable success" in the action, is shown by its failure to persuade a single judge who has viewed evidence in this case that it was entitled to succeed. Judge Gurfein was not persuaded on the evidence and argument submitted to him; neither was Judge Gesell. The five judges of eight on the Court of Appeals for the Second Circuit, who voted to remand, affirmed Judge Gurfein on all that was before him; and the two judges who dissented in part in the Court of Appeals for the District of Columbia Circuit in the Washington *Post* case voted to affirm Judge Gesell on all that was before them. Having failed to persuade a single judge of the nineteen before whom this case has thus far been heard of the factual validity of the Government's position as thus far developed, the Government can hardly demonstrate that the decision of Judge Gurfein was clearly erroneous.

Moreover, even assuming the Government could prove all it claims, it can hardly show that Judge Gurfein's decision was clearly erroneous, since the possibility of irreparable injury to the Government is at this point virtually nil. There has already been what the Court of Appeals for the District of Columbia Circuit characterized in the Washington *Post* case as a "leak" of "massive character." Not only in New York and Washington, but in Boston, Chicago,

Los Angeles, St. Louis and elsewhere, lengthy portions of the Vietnam study have been published. An injunction, after all, is supposedly designed to protect the party seeking it against the consequences of certain future events. No such purpose could now be served by any further restraint upon the *Times*.

CONCLUSION

This country's experience with censorship of political speech is happily almost non-existent. Through wars and other turbulence, we have avoided it. Given the choice of risks, we have chosen to risk freedom, as the First Amendment enjoins us to do.

We have not opted for some naive insistence that all our processes of government take place in the open, or that those charged with heavy responsibilities, executive, legislative or judicial, be denied privacy in their decisional processes. But we have preserved the values of decisional privacy without resorting to censorship. We have met the needs for privacy by safeguarding it at the source, as in the Government's internal procedures for maintaining informational security. In some limited measure, we have used the deterrent force of the criminal sanction to safeguard privacy and security. But we have not censored.

As our affidavits show, press and government have a curious, interlocking, both cooperative and adversary relationship. This has been the case more or less in this country since the extension of manhood suffrage, and the rise of an independent, rather than party-connected, or faction-connected press. It is not a tidy relationship. It is unruly, or to the extent that it operates under rules, these are unwritten and even tacit ones. Unquestionably, every so often it malfunctions from the point of view of one or the other partner to it. The greater power within it lies

with the Government. The press wields the countervailing power conferred upon it by the First Amendment. If there is something near a balance, it is an uneasy one. Any redressing of it at the expense of the press, as this case demonstrates, can come only at the cost of incursions into the First Amendment.

In effect, in this case the Court is asked, without benefit of statute, to redress the balance, to readjust the uneasy arrangement which has, after all, served us well. That which the Government seeks in this case is outside the framework of both law and history.

Except as it inferentially affirms the judgment of the District Court, the judgment of the Court of Appeals should be reversed, and the case remanded with directions to dismiss the complaint.

Respectfully submitted,

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Dated: June 26, 1971

NEW YORK TIMES CO. v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1873. Argued June 26, 1971—Decided June 30, 1971*

The United States, which brought these actions to enjoin publication in the New York Times and in the Washington Post of certain classified material, has not met the "heavy burden of showing justification for the enforcement of such a [prior] restraint."

No. 1873, — F. 2d —, reversed and remanded; No. 1885, — U. S. App. D. C. —, — F. 2d —, affirmed.

Alexander M. Bickel argued the cause for petitioner in No. 1873. With him on the brief were *William E. Hegarty* and *Lawrence J. McKay*.

Solicitor General Griswold argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Mardian* and *Daniel M. Friedman*.

William R. Glendon argued the cause for respondents in No. 1885. With him on the brief were *Roger A. Clark, Anthony F. Essaye, Leo P. Larkin, Jr.*, and *Stanley Godofsky*.

Briefs of *amici curiae* were filed by *Bob Eckhardt* and *Thomas I. Emerson* for Twenty-Seven Members of Congress; by *Norman Dorsen, Melvin L. Wulf, Burt Neuborne, Bruce J. Ennis, Osmond K. Fraenkel*, and *Marvin M. Karpatkin* for the American Civil Liberties Union; and by *Victor Rabinowitz* for the National Emergency Civil Liberties Committee.

*Together with No. 1885, *United States* v. *Washington Post Co. et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PER CURIAM:

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U. S. Decision-Making Process on Viet Nam Policy." *Post*, pp. 942, 943.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963); see also *Near* v. *Minnesota*, 283 U. S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971). The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe

that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms.[1] They especially feared that the

[1] In introducing the Bill of Rights in the House of Representatives, Madison said: "[B]ut I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against the encroachments on particular rights . . . ." 1 Annals of Cong. 433. Congressman Goodhue added: "[I]t is the wish of many of our constituents, that something should be added to the Constitution, to secure in a stronger manner their liberties from the inroads of power." *Id.*, at 426.

new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; *and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.*"[1] (Emphasis added.) The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men

[1] The other parts were:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

"The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." 1 Annals of Cong. 434.

that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

"Now, Mr. Justice [BLACK], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only

> say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true. . . . [T]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."[3]

And the Government argues in its brief that in spite of the First Amendment, "[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief."[4]

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.[5] See concurring opinion of MR. JUSTICE DOUGLAS,

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[3] Tr. of Oral Arg. 76.

[4] Brief for the United States 13-14.

[5] Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives, Madison said: "If they [the first ten amendments] are incorporated into the Con-

post, at 721–722. To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free

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stitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439.

assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." [6]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall make no law . . . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press.[1]

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. 18 U. S. C. § 793 (e) provides that "[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined

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[6] *De Jonge* v. *Oregon*, 299 U. S. 353, 365.

[1] See *Beauharnais* v. *Illinois*, 343 U. S. 250, 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth* v. *United States*, 354 U. S. 476, 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates* v. *United States*, 354 U. S. 298, 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293 (concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison* v. *Louisiana*, 379 U. S. 64, 80 (my concurring opinion which MR. JUSTICE BLACK joined).

not more than $10,000 or imprisoned not more than ten years, or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792–799. In three of those eight "publish" is specifically mentioned: § 794 (b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . [the disposition of armed forces]."

Section 797 applies to whoever "reproduces, *publishes*, sells, or gives away" photos of defense installations.

Section 798 relating to cryptography applies to whoever: "communicates, furnishes, transmits, or otherwise makes available . . . *or publishes*" the described material.[2] (Emphasis added.)

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read: "During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the

[2] These documents contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

enemy." 55 Cong. Rec. 1763. During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong. Rec. 2167.

Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U. S. C. § 793 states in § 1 (b) that:

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." See *Hirabayashi* v. *United States*, 320 U. S. 81, 93. But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "[t]o declare War." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures[3] may have a serious impact. But that is no basis for sanctioning a previous restraint on

[3] There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the *in camera* brief of the United States. It is all history, not future events. None of it is more recent than 1968.

the press. As stated by Chief Justice Hughes in *Near* v. *Minnesota*, 283 U. S. 697, 719–720:

> "While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

As we stated only the other day in *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. *Minnesota*, 283 U. S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental sup-

pression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269–270.

I would affirm the judgment of the Court of Appeals in the *Post* case, vacate the stay of the Court of Appeals in the *Times* case and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near* v. *Minnesota*.

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining

orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences

may result.* Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near* v. *Minnesota*, *supra*, at 713. Thus, only governmental allegation and proof that publication must inevitably, di-

Freedman v. *Maryland*, 380 U. S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." *Roth* v. *United States*, 354 U. S. 476, 481 (1957). Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

rectly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative [1] and Judicial [2] branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a

[1] The President's power to make treaties and to appoint ambassadors is, of course, limited by the requirement of Art. II, § 2, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "raise and support Armies," and "provide and maintain a Navy." And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

[2] See *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103; *Hirabayashi* v. *United States*, 320 U. S. 81; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; cf. *Mora* v. *McNamara*, 128 U. S. App. D. C. 297, 387 F. 2d 862, cert. denied, 389 U. S. 934.

President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is.[3] If the Constitution gives the Executive

[3] "It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which

a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect

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would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . .". *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior re-

straints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[1] Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

[1] The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 U. S. C. § 160 (c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U. S. C. § 45 (b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–620 (1969). Article I, § 8, of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest;[2] and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress and regardless of the circumstances by which the newspaper came into possession of the information.

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is

[2] The "grave and irreparable danger" standard is that asserted by the Government in this Court. In remanding to Judge Gurfein for further hearings in the *Times* litigation, five members of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified with particularity by the Government would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in

1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.[3] Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the people through some man." 55 Cong. Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper "should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing." *Id.*, at 2009.[4]

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[3] "Whoever, in time of war, in violation of reasonable regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall publish any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be useful to the enemy, shall be punished by a fine . . . or by imprisonment . . . ." 55 Cong. Rec. 2100.

[4] Senator Ashurst also urged that " 'freedom of the press' means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason." 55 Cong. Rec. 2005.

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 [5] makes it a crime to publish certain photographs or drawings of military installations. Section 798,[6] also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic sys-

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[5] Title 18 U. S. C. § 797 provides:

"On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[6] In relevant part 18 U. S. C. § 798 provides:

"(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

"(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

"(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

"(3) concerning the communication intelligence activities of the United States or any foreign government; or

"(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

tems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.' If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they

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[1] The purport of 18 U. S. C. § 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that "[t]his bill makes it a crime to reveal the methods, techniques, and matériel used in the transmission by this Nation of enciphered or coded messages. . . . Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking." H. R. Rep. No. 1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." *Id.*, at 2. Existing legislation was deemed inadequate.

"At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers." *Ibid.*

Section 798 obviously was intended to cover publications by nonemployees of the Government and to ease the Government's burden in obtaining convictions. See H. R. Rep. No. 1895, *supra*, at 2–5. The identical Senate Report, not cited in parallel in the text of this footnote, is S. Rep. No. 111, 81st Cong., 1st Sess. (1949).

publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793 (e) [8] makes it a criminal act for any unauthorized possessor of a document "relating to the national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no

[8] Section 793 (e) of 18 U. S. C. provides that:

"(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;"

is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both. It should also be noted that 18 U. S. C. § 793 (g), added in 1950, see 64 Stat. 1004; S. Rep. No. 2369, Pt. 1, 81st Cong., 2d Sess., 9 (1950), provides that "[i]f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."

penalty for the unauthorized possessor unless demand for the documents was made.[8] "The dangers surrounding the unauthorized possession of such items are self-

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[8] The amendment of § 793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was in turn Title I of the Internal Security Act of 1950. See 64 Stat. 987. The report of the Senate Judiciary Committee best explains the purposes of the amendment:

"Section 18 of the bill amends section 793 of title 18 of the United States Code (espionage statute). The several paragraphs of section 793 of title 18 are designated as subsections (a) through (g) for purposes of convenient reference. The significant changes which would be made in section 793 of title 18 are as follows:

"(1) Amends the fourth paragraph of section 793, title 18 (subsec. (d)), to cover the unlawful dissemination of 'information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.' *The phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense' and not the other items enumerated in the subsection.* The fourth paragraph of section 793 is also amended to provide that only those with lawful possession of the items relating to national defense enumerated therein may retain them subject to demand therefor. Those who have unauthorized possession of such items are treated in a separate subsection.

"(2) Amends section 793, title 18 (subsec. (e)), to provide that unauthorized possessors of items enumerated in paragraph 4 of section 793 must surrender possession thereof to the proper authorities without demand. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand. The only difference between subsection (d) and subsection (e) of section 793 is that a demand by the person entitled to receive the items would be a necessary element of an offense under subsection (d) where the possession is lawful, whereas such

evident, and it is deemed advisable to require their surrender in such a case, regardless of demand; especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S. Rep. No. 2369, Pt. 1, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In *Gorin* v. *United States*, 312 U. S. 19, 28 (1941), the words "national defense" as used in a predecessor of § 793 were held by a unanimous court to have "a well understood connotation"—a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"—and to be "sufficiently definite to apprise the public of prohibited activi-

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a demand would not be a necessary element of an offense under subsection (e) where the possession is unauthorized." S. Rep. No. 2369, Pt. 1, 81st Cong., 2d Sess., 8–9 (1950) (emphasis added).

It seems clear from the foregoing, contrary to the intimations of the District Court for the Southern District of New York in this case, that in prosecuting for communicating or withholding a "document" as contrasted with similar action with respect to "information" the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct. The District Court relied on *Gorin* v. *United States*, 312 U. S. 19 (1941). But that case arose under other parts of the predecessor to § 793, see 312 U. S., at 21–22—parts that imposed different intent standards not repeated in § 793 (d) or § 793 (e). Cf. 18 U. S. C. §§ 793 (a), (b), and (c). Also, from the face of subsection (e) and from the context of the act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793 (e) if they communicate or withhold the materials covered by that section. The District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

ties" and to be consonant with due process. 312 U. S., at 28. Also, as construed by the Court in *Gorin*, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States.[10]

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585–586 (1952); see also *id.*, at 593–628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a news-

[10] Also relevant is 18 U. S. C. § 794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, any information with respect to the movements of military forces, "or with respect to the plans or conduct . . . of any naval or military operations . . . or any other information relating to the public defense, which might be useful to the enemy . . . ."

paper from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" Brief for the United States 7. With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Executive Order 10501 (1953), to classify documents and information. See, *e. g.*, 18 U. S. C. § 798; 50 U. S. C. § 783.[1] Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether in these particular cases the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See *In re Debs*, 158 U. S. 564, 584 (1895). The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948); *Hirabayashi* v. *United States*, 320 U. S. 81, 93 (1943); *United States* v.

[1] See n. 3, *infra*.

Curtiss-Wright Corp., 299 U. S. 304 (1936).[2] And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than to ask the Congress to pass a law and it may be more convenient to enforce a contempt order than seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the

[2] But see *Kent* v. *Dulles*, 357 U. S. 116 (1958); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

moment do not justify a basic departure from the principles of our system of government.

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in Chapter 37 of U. S. C., Title 18, entitled Espionage and Censorship.[3] In that chapter,

[3] There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently imperiled national security to warrant that result. These include 42 U. S. C. §§ 2161 through 2166 relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U. S. C. § 2162 authorizes the Atomic Energy Commission to classify certain information. Title 42 U. S. C. § 2274, subsection (a), provides penalties for a person who "communicates, transmits, or discloses [restricted data] . . . with intent to injure the United States or with intent to secure an advantage to any foreign nation . . . ." Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation . . . ." Other sections of Title 42 of the U. S. C. dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. Title 42 U. S. C. §§ 2276, 2277. Title 50 U. S. C. App. § 781, 56 Stat. 390, prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation,

Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. See *Bennett* v. *Laman*, 277 N. Y. 368, 14 N. E. 2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. See Z. Chafee & E. Re, Equity 935–954 (5th ed. 1967); 1 H. Joyce, Injunctions §§ 58–60a (1909). Here there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers that there is probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute or decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined.

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as specified; and indeed Congress in the National Defense Act of 1940, 54 Stat. 676, as amended, 56 Stat. 179, conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U. S. C. App. § 1152 (6). 50 U. S. C. § 783 (b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person who that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.

At least one of the many statutes in this area seems relevant to these cases. Congress has provided in 18 U. S. C. § 793 (e) that whoever "having unauthorized possession of, access to, or control over any document, writing, code book, signal book . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits . . . the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both." Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U. S. C. § 793 (e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793 (e): He found that the words "communicates, delivers, transmits . . ." did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong. Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. See my Brother WHITE's concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court

to redecide those issues—to overrule Congress. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

> "During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: *Provided*, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same." 55 Cong. Rec. 1763.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that

the decision to provide such power be reconsidered. Instead, the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957 the United States Commission on Government Security found that "[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons." In response to this problem the Commission proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified." Report of Commission on Government Security 619–620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong. Rec. 10447–10450. If the proposal that Sen. Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near* v. *Minnesota*, 283 U. S. 697 (1931), until recently in *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. MR. JUSTICE HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public right-to-know; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout fire in a crowded theater. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near* v. *Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. A great issue of this kind should be tried in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is

unwarranted in light of the long period the Times, by its own choice, deferred publication.

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged right-to-know has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not in fact jeopardized, much of the material could no doubt have been declassified, since it spans a period ending in 1968. With such an approach—one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press—the newspapers and Government might well have narrowed the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in

orderly litigation, if necessary. To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.[1]

Our grant of the writ before final judgment in the *Times* case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel in oral argument before this Court were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally "around the clock" and simply were unable to review the documents that give rise to these cases and were not familiar with them. This Court is in no better posture. I agree

[1] Interestingly the Times explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise *its* sources and informants! The Times thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN but I am not prepared to reach the merits.[2]

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the *Post* case. I would direct that the District Court on remand give priority to the *Times* case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial process.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400–401 (1904):

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future,

[2] With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

> but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a. m. The application of the United States for interim relief in the *Post* case was also filed here on June 24 at about 7:15 p. m. This Court's order setting a hearing before us on June 26 at 11 a. m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p. m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. Com-

pare *In re Debs*, 158 U. S. 564 (1895); with *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). This question involves as well the construction and validity of a singularly opaque statute—the Espionage Act, 18 U. S. C. § 793 (e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931) (dictum).

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired. Cf. *Liberty Lobby, Inc.* v. *Pearson*, 129 U. S. App. D. C. 74, 390 F. 2d 489 (1967, amended 1968).

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts,* and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on the Court—should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit in the *Times* litigation to observe that its order must rest on the conclusion that because of the time elements the Government had not been given an adequate opportunity to present its case

*The hearing in the *Post* case before Judge Gesell began at 8 a. m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p. m. on the same day. The hearing in the *Times* case before Judge Gurfein was held on June 18 and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting *en banc*, on June 22. Each court rendered its decision on the following afternoon.

to the District Court. At the least this conclusion was not an abuse of discretion.

In the *Post* litigation the Government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the Second Circuit. But I think there is another and more fundamental reason why this judgment cannot stand—a reason which also furnishes an additional ground for not reinstating the judgment of the District Court in the *Times* litigation, set aside by the Court of Appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

> "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800).

From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. See *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321 (1936), collecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

> "The nature of foreign negotiations requires caution, and their success must often depend on secrecy;

> and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers." 1 J. Richardson, Messages and Papers of the Presidents 194–195 (1896).

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." Cf. *United States* v. *Reynolds*, 345 U. S. 1, 8 (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. See *id.*, at 8 and n. 20; *Duncan* v. *Cammell, Laird & Co.*, [1942] A. C. 624, 638 (House of Lords).

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

> "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such de-

cisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the

restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long enough to act responsibly in matters of such national importance as those involved here.

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

At this point the focus is on *only* the comparatively few documents specified by the Government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. Almost 70 years ago Mr. Justice Holmes, dissenting in a celebrated case, observed:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure . . . ." *Northern Securities Co. v. United States*, 193 U. S. 197, 400–401 (1904).

The present cases, if not great, are at least unusual in their posture and implications, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months examining the 47 volumes that came into its unauthorized possession. Once it had begun publi-

cation of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly, once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or otherwise, was abhorrent and was to be deemed violative of the First Amendment and of the public's "right immediately to know." Yet that newspaper stood before us at oral argument and professed criticism of the Government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, one would hope, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on required remand, with the Washington Post, on the excuse that it was trying to protect its source of information, initially refusing to reveal what material it actually possessed, and with the District Court forced to make assumptions as to that possession.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's

vital welfare. The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the Times itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, *Near* v. *Minnesota*, 283 U. S. 697, 708 (1931), and *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in *Schenck*,

> "It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." 249 U. S., at 52.

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the

orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

It may well be that if these cases were allowed to develop as they should be developed, and to be tried as lawyers should try them and as courts should hear them, free of pressure and panic and sensationalism, other light would be shed on the situation and contrary considerations, for me, might prevail. But that is not the present posture of the litigation.

The Court, however, decides the cases today the other way. I therefore add one final comment.

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, "could clearly result in great harm to the nation," and he defined "harm" to mean "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate . . . ." I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share

his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.